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~~ORIGINAL~~
No. 12159 2578 Pocketed

**United States
Court of Appeals**

for the Ninth Circuit

In the Matter of

THE WESTERN PACIFIC RAILROAD COM-
PANY, Debtor, THE WESTERN PACIFIC
RAILROAD CORPORATION,

Appellant,

vs.

THE WESTERN PACIFIC RAILROAD COM-
PANY,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED
APR 29 1949

No. 12159

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States, for the
Northern District of California, Southern
Division

No. 26591-S

In the Matter of THE WESTERN PACIFIC
RAILROAD COMPANY,

Debtor.

In the proceedings for the reorganization of a
railroad.

ORDER

Upon due consideration of the petition of The Western Pacific Railroad Company, the above named debtor, verified August 2, 1935, and filed herein this day, stating that such debtor is unable to meet its debts as they mature and that it desires to effect a Plan of Reorganization in accordance with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and the Court being satisfied that such petition complies with said section and has been filed in good faith, it is Ordered:

(1) That said petition be, and hereby is, approved as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

(2) That the debtor be, and it hereby is, authorized and directed, pending further order of the court in the premises, to run, manage, maintain, operate and keep in proper condition and repair the railroads and property of the debtor, wherever

situated, whether in this state, judicial circuit, or elsewhere and to manage and conduct its business as a railroad company, and to this end to exercise its authority and franchises and discharge all public duties obligatory upon it, and to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees; to collect and receive the incomes, rents, revenues, tolls, issues and profits of said property; to collect all outstanding accounts and all dividends and interest on securities belonging to it; to exercise such sale, conveyance, exchange and release rights as are reserved to, or available to, the debtor, under outstanding deeds of trust, mortgages, trust indentures and similar instruments, and to use the proceeds of sale of all released property as provided in such instruments; all in the same manner that it would be entitled and bound to do in its own right; and, to the extent necessary to protect and preserve the property of the debtor, to make and pay for additions and betterments to the railroads and property of the debtor; and to make such advances to its subsidiary corporations as are necessary to protect the debtor's interest therein, all in the same manner that it would be entitled and bound to do in its own right; and, to the extent necessary to protect and preserve the property of the debtor, to make and pay for additions and betterments to the railroads and property of the debtor, all of the foregoing powers to be exercised according to law, and subject to such supervision and control by the Court as the Court may exercise

by further orders entered herein. The authority given by the foregoing shall not include authority to incur expense, other than such as is necessary in the course of the usual and ordinary maintenance and operation of the debtor's property. Any extraordinary expense and expense incident to reorganization of the debtor shall be subject to the prior approval of the Court.

(3) That the debtor is authorized, in its discretion, from time to time until further order of this Court; out of funds now or hereafter coming into its hands, to pay:

(a) All taxes and assessments due or to become due upon the property of the debtor.

(b) All necessary expenses of operating the railroads and conducting the business of the debtor, including among other expenses the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents and employees retained by the debtor; ticket, traffic, car mileage and car per diem balances; interline accounts, freight and overcharge claims; interest on and installments of principal of equipment trust obligations; and amounts for car and equipment repairs now due or that may become due to connecting or other railroad companies or other common carriers, including all sums now due or which may hereafter become due to other persons or corporations for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges and other railroad facil-

ities, and such sums as may be necessary to comply with the obligations of the debtor under contracts by virtue of which said occupation or use may now or hereafter be enjoyed (but such payments shall not constitute affirmations of said contracts, or any of them);

(c) The following claims incurred by the debtor within six months preceding the date of this order, in the usual and customary operation of its properties, and the conduct of its current business, to-wit: Wages, salaries, fees, and other charges due and payable for services rendered to the debtor, unpaid material and supply accounts incurred in the operation of said properties; unpaid and outstanding pay checks and wage checks representing labor actually performed for the debtor. The debtor is also authorized in its discretion to adjust, compromise and pay claims of shippers, consignees, or others in interest, for overcharges or reparation awards, and for loss, damage or delay to freight and baggage; also to settle and pay on behalf of itself and other carriers and private car owners, claims arising out of rate divisions, interline settlements, per diem accounts, switching reclaims, proportion of reparation awards, and freight charges or adjustments respecting shipments with transit or storage privileges and other charges or adjustments of like character, between carriers in the conduct of their joint business, regardless of when accrued.

(d) Pending further order of this Court in the

premises, the debtor hereby is authorized to pay pay checks, and like instruments issued to employees for services rendered to the debtor, whether before or during said six months' period, whenever the same are presented for payment.

(e) The cost of maintaining the corporate existence of the debtor, including the necessary expenses of the preservation of records, and the registration and transfer of its stocks and bonds, and trustees' charges under indenture under which securities of the debtor have been issued.

(f) All monthly payments due from time to time under any existing pension or insurance system of the debtor.

(g) The expense of printing pleadings, motions, petitions and orders now on file or hereafter filed in this case reasonably necessary to be printed, in such quantity as shall provide copies for the use of the Court, the debtor, parties to the cause, and such others as may have a substantial interest therein; such expense to be taxed as costs in this case.

(4) That the debtor shall be allowed until January 1, 1936 (unless the time be extended further by order of this Court), within which to disaffirm any contracts. Such disaffirmance shall be indicated by notice to that effect, in writing, served on the other party or parties to such contract, and filed of record in this proceeding, and continued operation by the debtor under any of said contracts,

within said period allowed for disaffirmances, shall not be deemed to conclude the debtor in respect of such election, or to constitute an election.

(5) That, pending further order of the Court in the premises, the debtor is authorized and empowered to institute or prosecute in any Court, or before any tribunal of competent jurisdiction, all such suits and proceedings as may be necessary, in its judgment, for the recovery or proper protection of its property or rights, and to make settlement of any thereof; and likewise to defend or liquidate, by written agreement or consent judgments, any actions, claims, proceedings, or suits, now pending against the debtor, or which may hereafter be asserted, or be brought in any court, or before any officer, department, commission or tribunal, to which the debtor is, or shall be, a party, but no payments shall be made by the debtor in respect of any such claims accruing prior to the date of this order, in respect of any actions, proceedings, or suits, on such claims, without further order or direction of this Court except as may be provided in other paragraphs of this order and except such as may be permitted by other general orders hereafter entered herein, and such as constitute preferred claims under the Acts of Congress relating to bankruptcy; and no action taken by the debtor in defense or settlement of such claims, actions, proceedings, or suits, shall have the effect of establishing any claims upon, or right in, the property or funds in the possession of the debtor, that otherwise would not exist.

(6) That the debtor shall close its present books

of account as of the close of business on July 31, 1935. The debtor shall open new books of account as of the opening of business on August 1, 1935, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the debtor, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the debtor are presently deposited as shall be selected by the debtor, or in such other bank or banks as shall be selected by and approved by this Court.

(7) That within sixty days after the entry of this order, the debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the debtor as of the close of business on July 31, 1935, and within fifty days after the close of each calendar month thereafter shall file with said Clerk a statement of the assets and liabilities of the debtor as of the close of business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the debtor of the second preceding calendar month. All such statements shall be certified as correct by the chief accounting officer of the debtor.

(8) That all persons, firms and corporations, whatsoever and wheresoever situated, located, or domiciled, hereby are restrained and enjoined from interfering with, attaching, garnisheeing, levying upon, and enforcing liens upon, or in any manner

whatsoever disturbing any portion of the assets, goods, money, railroads, properties and premises belonging to, or in the possession of the debtor, or from taking possession of the same, or any part thereof, or in any way interfering in any manner to prevent the discharge by the debtor of its duties in the operation of said property and business, under the orders of this Court, or from bringing any new suits or actions, accruing prior to this date, in or before any Court from which an appeal or proceedings to review, can be taken only upon the filing of an appeal bond, as a jurisdictional or mandatory requirement.

(9) That all persons and corporations holding collateral heretofore pledged by the debtor as security for its notes or obligations be, and each of them is, hereby restrained and enjoined from selling, converting or otherwise disposing of such collateral, or any part thereof, until further order of this Court.

(10) This Court reserves full power and jurisdiction to make from time to time such orders amplifying, extending, limiting or otherwise modifying this order as to the Court may at any time seem proper.

/s/ A. F. St. SURE,
District Judge.

Dated August 2, 1935.

[Endorsed]: Filed Aug. 2, 1935.

[Title of District Court and Cause.]

ORDER FIXING TIME FOR PRESENTATION OF CLAIMS

Upon due consideration of the petition of The Western Pacific Railroad Company, the above named debtor, verified August 20, 1935, and filed herein this day praying for an order determining a reasonable time within which the claims and interests of creditors and stockholders of the debtor may be filed or evidenced and after which no such claim or interest may participate in any plan, except on order for cause shown, the manner in which such claims and interests may be filed or evidenced and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and for such other authority in the premises as to the Court shall deem desirable, and after hearing counsel for the debtor and the Court being fully advised in the premises, it is accordingly.

Ordered, adjudged and decreed as follows:

First. All claims and interests of creditors and stockholders of the debtor shall be filed or evidenced in the manner herein provided, on or before September 15, 1935, excepting, however, claims against the debtor growing out of the current operation of the railroad properties of the debtor and not affected by the proposed plan of reorganization. No such claim or interest may participate in any plan except on order for cause shown unless filed or evi-

denced on or before September 15, 1935, and in the manner herein provided.

Second. The manner in which such claims and interests shall be filed or evidenced shall be as follows:

(a) For all purposes, except as hereinafter provided, the amount of the aggregate claims of the holders of mortgage bonds issued, assumed or guaranteed by the debtor or constituting a lien upon property of the debtor, and of equipment obligations guaranteed by the debtor or constituting a lien upon property leased to the debtor, shall be evidenced (subject to final allowance thereof) as to each class of such bonds and each series of such equipment obligations, by the filing with the Clerk of this Court a verified statement of the corporate trustees under the indenture or agreement securing such bonds or equipment obligations showing the principal amount of such bonds or equipment obligations outstanding, as shown by the records of such corporate trustee; and the amounts of such bonds and equipment obligations, if any, pledged to secure bonds of other issues, or other obligations of the debtor, shall be evidenced, except as the Court shall otherwise hereafter direct, by the filing with the Clerk of this Court of a verified statement of the pledgee thereof. For the purpose of being heard on any question arising in the proceedings or of participating in any plan confirmed by this Court, all such claims shall be evidenced by presentation of such bonds and/or equipment obligations or of certificates of deposit of any bank, trust

company or other depositary satisfactory to the Court representing, and entitling the holder thereto to the possession of ownership of, such bonds and/or equipment obligations, or, but only for the purpose of being heard on any such question, by presentation of the certificate of any bank, trust company or other depositary satisfactory to this Court stating that such bonds and/or equipment obligations are held by it for safekeeping or otherwise for account of the person or persons desiring to be heard.

(b) For all purposes, except as hereafter provided, the interests of the holders of Preferred Stock and Common Stock of the debtor shall be evidenced by the stock books of the debtor. For the purpose of being heard on any question arising in the proceeding or of participating in any plan confirmed by this Court, such interests shall be evidenced by presentation of the certificate or certificates representing any such stock, or, but only for the purpose of being heard on an such question, by the presentation of the certificate of any bank, trust company or other depositary satisfactory to this Court stating that the certificate or certificates representing such stock is or are held by it for safekeeping or otherwise for account of the person or persons desiring to be heard.

(c) All other claims or interests of whatever character shall, for all purposes, be evidenced (subject to final allowance thereof) by filing with the Clerk of this Court of verified proofs of claims in such form as may be approved by the debtor and as may be acceptable to this Court, and, unless other-

wise requested by the debtor and directed by this Court, such proofs of claim may be in substantially the form of the official forms for proofs of claim prescribed by the Supreme Court of the United States; and, unless and until requested by the debtor or otherwise directed by this Court, the originals of written instruments executed by the debtor on which a claim purports to be founded, need not be filed with such proofs of claim.

Third. All claims and interests of creditors and stockholders of the debtor shall in due course be allowed by this Court, or by a Special Master, should one hereafter be appointed, pursuant to such orders and directions in respect thereof as may hereafter be made by this Court, when evidenced as hereinbefore provided, unless this Court shall otherwise determine or unless objection to such allowance shall be filed with this Court or such Special Master (on or before such date as this Court may hereafter determine), in which case such claims or interests in respect of which such objections shall have been filed shall be proved before this Court or before such Special Master.

Fourth. The creditors and stockholders of the debtor are hereby divided into the following classes according to the nature of their respective claims and interests; (reference being made to said petition of the debtor filed herein verified August 20, 1935, for a more detailed description thereof), to wit, the respective holders of the following claims and interests, each of the following numbered paragraphs constituting a separate class:

1. First Mortgage 5% Bonds.
2. General and Refunding Mortgage Bonds.
3. The debtor's secured promissory notes to A. C. James Co.
4. The debtor's secured promissory notes to Reconstruction Finance Corporation.
5. The debtor's secured promissory notes to The Railroad Credit Corporation.
6. Equipment obligations to Baldwin Locomotive Works (Assigned to Fidelity-Philadelphia Trust Co., Trustee.).
7. Equipment Trust Certificates under agreement dated March 1, 1923.
8. Equipment Trust Certificates under agreement dated March 15, 1924.
9. Equipment Trust Certificates under agreement dated May 1, 1929.
10. The debtor's obligation as to advances made on open account by The Western Pacific Railroad Corporation.
11. The debtor's obligation as to advances made on open account by The Western Realty Company.
12. The debtor's Preferred Capital Stock.
13. The debtor's Common Stock.
14. All other claims, obligations and liabilities not hereinabove specifically described.

Fifth. None of the foregoing claims or obligations is affected by the Plan of Reorganization herein except:

- (a) First Mortgage 5% Bonds.
- (b) General and Refunding Mortgage Bonds.

(c) The debtor's secured promissory notes to A. C. James Co.

(d) The debtor's secured promissory notes to Reconstruction Finance Corporation.

(e) The debtor's secured promissory notes to The Railroad Credit Corporation.

(f) The debtor's obligation as to advances made on open account by The Western Pacific Railroad Corporation.

(g) The debtor's obligation as to advances made on open account by The Western Realty Company.

(h) The debtor's Preferred Capital Stock.

(i) The debtor's Common Stock.

Sixth. The debtor shall give notice accordingly by mailing, at their respective addresses as shown by the records of the debtor, a copy of this order to each of the corporate trustees under the indentures or agreements securing the above-mentioned mortgage bonds and equipment obligations, to A. C. James Co., to Reconstruction Finance Corporation, to The Railroad Credit Corporation, to The Western Pacific Railroad Corporation, to the Western Realty Company, and by publication of a brief summary of this order in a newspaper published in the City of San Francisco and in a newspaper published in the City of New York. Such mailing and publication shall be made prior to September 1, 1935, unless the time be extended by further order of the Court herein, and thereafter proof of such mailing and publication shall be filed herein, but the failure of any creditor to receive any such notice shall not, unless the Court in its discretion

shall otherwise determine, constitute cause for extending the time within which any such creditor may comply with the provisions of this order.

Seventh. The foregoing division of creditors and stockholders into classes is without prejudice to the rights of any such creditors and stockholders and of the debtor in any litigation or controversy, in respect of the claims and interests represented thereby, in the event the Plan of Reorganization proposed by the debtor is not confirmed and consummated and such claims and interests disposed of in accordance with such Plan of Reorganization.

This Court reserves full right and jurisdiction to make, from time to time, such further orders (including orders reclassifying the claims or interests of creditors and stockholders) amplifying, extending, limiting or otherwise modifying this order, as to it may at any time seem proper.

Dated: Aug. 20, 1935.

/s/ A. F. St. SURE,
District Judge.

[Endorsed]: Filed Aug. 20, 1935.

[Title of District Court and Cause.]

ORDER APPOINTING TRUSTEES

This cause coming on further to be heard this day pursuant to subdivision (c) of amendatory Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy and to the Order of this Court entered herein August 31, 1935;

And it appearing to the Court that debtor has given notice as directed in said Order entered August 31, 1935, to the mortgage trustees, creditors and stockholders and has caused publication thereof for such period and in such newspapers as said Order directs of a hearing to be held this day at ten o'clock in the forenoon, at which hearing, or any adjournment thereof, the Court shall appoint one or more trustees of debtor's property, as provide in said amendatory Section 77; and the following parties having appeared herein, or communicated to this Court recommendations with respect to the appointment of such trustees:

Crocker First National Bank of San Francisco and Samuel Armstrong, successor trustees, under indenture securing debtor's First Mortgage 5% Bonds;

The Chase National Bank of the City of New York, as trustee under indenture securing debtor's General and Refunding Mortgage Bonds;

A. C. James Co., holder of certain of debtor's secured promissory notes;

Reconstruction Finance Corporation, holder of certain of debtor's secured promissory notes;

The Railroad Credit Corporation, holder of certain of debtor's secured promissory notes;

Fidelity-Philadelphia Trust Co., Trustee of equipment obligations to Baldwin Locomotive Works;

The Chase National Bank of the City of New

York, as Trustee under agreement dated March 1, 1923, covering Equipment Trust Certificates;

The Chase National Bank of the City of New York, as Trustee under agreement dated March 15, 1924, covering Equipment Trust Certificates;

The Chase National Bank of the City of New York, as Trustee under agreement dated May 1, 1929, covering Equipment Trust Certificates;

The Western Pacific Railroad Corporation, holder of debtor's obligation for advances on open account;

The Western Realty Company, holder of debtor's obligation for advances made on open account;

The Western Pacific Railroad Corporation, holder of debtor's Preferred Capital Stock;

The Western Pacific Railroad Corporation, holder of debtor's Common Stock;

And it appearing to the Court that the creditors and stockholders of the debtor represent that the appointment of trustees herein should not disturb the continuity of operations by the corporate organization of the debtor and should be at minimum cost to the debtor;

And it further appearing to the Court that under the by-laws of the debtor, T. M. Schumacher, as Chairman of the Executive Committee, is invested with general charge and supervision of and over the affairs and business of the debtor, and, subject to the control of the Board of Directors and Executive Committee, is given general supervision and direc-

tion of the debtor's business in all its departments and over all its officers, agents and employes;

And it further appearing to the Court that Charles Elsey, President of the debtor, is its chief operating officer, directing all of its operations as a common carrier, subject only to the supervision and direction of the Chairman of the Executive Committee;

And it further appearing to the Court that the Chairman of the Executive Committee has conducted all negotiations as to the formulation of pending form of reorganization of the debtor with representatives of holders of the First Mortgage Bonds and its junior creditors, all of whom are in the East, including Reconstruction Finance Corporation, which is undertaking to provide up to ten million dollars of new money to be expended in improving the property of the debtor and for working capital;

And it further appearing that Messrs. T. M. Schumacher and Charles Elsey, if appointed trustees of the debtor, to serve with the additional trustee hereinafter mentioned, are willing to serve without compensation other than that which they are now receiving as such executive officers, and to perform all of their duties pertaining to such officers, so that the appointment of the trustees herein will be without cost to the estate of the debtor, except the salary or compensation of the additional trustee hereinafter mentioned;

And it further appearing to the Court that under

the provisions of subdivision (c) of said amendatory Section 77, it is necessary for the Court to appoint an additional trustee, who within one year prior hereto has not been an officer, director or employe of the debtor, any subsidiary corporation or any holding company connected therewith;

It is hereby ordered:

1. That T. M. Schumacher, Chairman of the Executive Committee of the debtor; Charles Elsey, President of the debtor; and Sidney M. Ehrman, who within one year prior to the date of this Order has not been an officer, director or employe of the debtor, any subsidiary corporation or any holding company connected therewith, be and they hereby are appointed trustees of the debtor's property, which appointments, as well as the other provisions of this Order, shall be effective as of the beginning of business on October 1, 1935, upon ratification thereof by the Interstate Commerce Commission, as provided in subdivision (c) of said amendatory Section 77.

2. That said trustees shall have all the title and shall exercise, subject to the control of this Court and consistent with the provisions of said amendatory Section 77, all of the powers of trustees appointed pursuant to Section 44 of said Act; and, to the extent not inconsistent with said amendatory Section 77, the powers of a receiver in equity proceeding; and, subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission, as provided by the Interstate Com-

merce Act as now or hereafter amended, the power to operate the business of the debtor, which business shall be conducted in the name of the debtor by its regularly elected or appointed corporate officers, agents and employees, but under and subject to the direction of said trustees.

3. That said trustees shall have all of the powers, rights, privileges, duties and obligations heretofore granted to or imposed upon the debtor pursuant to the Order of this Court entered herein August 2, 1935, and any and all orders supplementary thereto or amendatory thereof; and each and all of the orders heretofore entered in this proceeding shall, with respect to the said trustees and the property of the debtor, be of like force and effect as though said trustees were therein specifically named in the place of the debtor, all of said orders being hereby incorporated in and made a part of this Order by reference.

4. That within five days from and after October 1, 1935, each of said trustees shall execute and file with the Clerk of this Court a bond or bonds with one or more sureties approved by the Clerk of this Court, for the benefit of whom it may concern, in the sum of twenty five thousand dollars, conditioned to the effect that they will well and truly perform the duties of their office and duly account for any moneys or properties which may come into their hands, and abide by and perform all things which they shall be directed by the Court to do.

5. That this Court reserves full right and juris-

diction to make from time to time such additional orders herein as to the Court shall seem proper, as well as any orders amplifying, extending, limiting or otherwise modifying this Order, and in all respects to regulate and control the conduct of said trustees.

Dated: September 23, 1935.

/s/ A. F. St. SURE,
District Judge.

[Endorsed]: Filed Sept. 23, 1935.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of June A. D. 1939.

Finance Docket No. 10913

WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION

It appearing, That this Commission, by its report and order of October 10, 1938, approved a plan of reorganization for the debtor; and

It further appearing, That upon the filing of petitions by the debtor and five other interveners, requesting that certain modifications be made in the approved plan, the proceeding was reopened and oral argument was heard on the question of such proposed modifications; and

It further appearing, That the Commission upon reconsideration of the record herein in the light of

the aforesaid argument, has, on the date hereof, made and filed its supplemental report containing its findings of fact and conclusions thereon with respect to the modifications of plan requested, and a full statement of the reasons therefor, which report is hereby referred to and made a part hereof:

It is hereby ordered, That the following plan of reorganization of the aforesaid debtor be, and it is hereby, approved:

Terms used herein shall have the following meanings respectively:

The debtor—The Western Pacific Railroad Company;

Consummation of the plan—The transfer to the reorganized company, to the extent contemplated by the plan, of the properties and assets of the debtor.

Court.—The District Court of the United States for the Northern District of California, Southern Division.

Effective date of the plan.—The date from which interest shall run on the new securities provided in the plan, namely, January 1, 1939.

First-Mortgage bonds.—Bonds issued under the first mortgage dated June 26, 1916, from the company to the First Federal Trust Company and Henry E. Cooper, as trustees (Crocker First National Bank and Samuel Armstrong successor trustees), designated as the first mortgage.

General and refunding bonds.—Bonds issued under the mortgage dated January 1, 1932, from the company to the Chase National Bank of the City of New York as trustee (Irving Trust Company

now successor trustee), designated as the general and refunding mortgage.

Reorganized company.—The corporation, whether the debtor or a new corporation, which shall acquire substantially all of the properties now held by the bankruptcy trustees and issue the new securities provided for by the plan.

A. The effective date of said plan shall be January 1, 1939.

B. The capitalization of the reorganized company, upon consummation of the plan, shall consist substantially of undisturbed equipment trusts, Baldwin lease, and Pullman contract, \$2,750,050; new first-mortgage 4-percent bonds \$10,000,000; new income-mortgage 4½-percent bonds \$21,219,075; new 5-percent preferred stock \$31,850,297; new common stock without par value 319,441 shares.

C. The first-mortgage bonds shall be secured by a first mortgage, which will be a lien, directly or through pledge of securities, subject only to liens upon equipment, on all the properties and assets owned by the reorganized company on the consummation of the plan, including securities, equipment, and the equity in such equipment as is subject to equipment obligations. The first mortgage will also be a lien on all similar property acquired by the reorganized company after the reorganization, except that (a) if the reorganized company shall acquire the properties of any other company (except a company which is a wholly owned railway subsidiary on January 1, 1939) constituting a class I carrier as defined by the rules of this Commis-

sion or other public regulatory bodies having jurisdiction at the time, such properties shall not be subject to the lien of the first mortgage unless acquired in whole or in part by the use of first-mortgage bonds or income-mortgage bonds, or moneys deposited under the first mortgage or the income mortgage, and (b) if the reorganized company shall be consolidated with, or shall be merged into, or shall sell its assets substantially as an entirety to, any other company which at the time is a class I carrier defined as aforesaid, no properties theretofore owned or thereafter acquired by such other company shall be subject to the lien of the first mortgage except properties thereafter acquired which shall be appurtenant or incident to properties subject to the lien of the first mortgage, or which shall be within the maintenance or replacement covenants of the first mortgage, or which shall be acquired in whole or in part by the use of first-mortgage bonds or income-mortgage bonds or moneys deposited under the first mortgage or the income mortgage.

D. The amount of bonds issuable under the first mortgage will be limited to \$50,000,000.

The first mortgage will provide (1) that on each May 1 when the aggregate principal amount of first-mortgage bonds outstanding shall equal or exceed \$20,000,000, the reorganized company will pay to the trustee under the first mortgage as a sinking fund a sum equal to one-half of 1 per cent of the maximum principal amount of first-mortgage bonds theretofore at any one time authenticated and un-

canceled; and (2) that on each May 1 when the aggregate principal amount of first-mortgage bonds outstanding plus all other funded debt bearing fixed interest shall exceed either (a) 35 percent of the total capitalization of the reorganized company, determined as hereinafter provided, or (b) 50 percent of such total capitalization, less the principal amount of funded debt bearing contingent interest at the time outstanding, the reorganized company, in addition to the sums provided in this subdivision D to be paid, will pay into said sinking fund a sum equal to 50 percent of the available net income of the next preceding calendar years that remains after providing for all income mortgage sinking funds and charges prior thereto (i.e., that remains after the deductions made pursuant to subparagraphs (1), (2), (3), (4), and (5) of the fourth paragraph of subdivision L hereof; or after the provisions of said subdivision L shall have ceased to be operative, 50 percent of net income as defined by the accounting rules or practice referred to in said subdivision L). Such sinking fund shall be applied to the retirement of first-mortgage bonds, by purchase in the open market or by call for tenders at not exceeding the redemption price (or in the case of bonds not redeemable, the principal amount and accrued interest), and whenever the amount in the sinking fund exceeds \$50,000 and first-mortgage bonds are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the sinking fund shall be applied to the redemption of new first-mortgage

bonds on the next succeeding interest payment date. All bonds so acquired shall be canceled and no bonds may be issued to refund any such bonds. First-mortgage bonds and income-mortgage bonds outstanding shall be deemed to include all bonds authenticated and delivered to the reorganized company which shall not have been canceled or assured of retirement through the deposit of cash. Funded debt shall include an amount equal to the capitalized value, at 5 percent per annum, of fixed rents payable for leased roads, other than terminal or bridge properties, but shall not include (a) obligations, other than mortgage bonds or equipment-trust obligations, maturing not more than two years after their date, or (b) obligations of longer maturity secured by pledge of bonds having a lien on property of the reorganized company except to the extent, if any, by which the principal amount of such obligations exceeds the principal amount of such bonds so pledged. Bonds guaranteed by the reorganized company as to interest or principal or both, other than bonds of a terminal or bridge company, shall be included in funded debt, but, in case of a joint and several guaranty with other corporations, only to the extent of the reorganized company's basic proportion of the principal liability. There shall be included in determining total capitalization only (a) obligations constituting funded debt, (b) stock having par value, at such par value, and (c) stock without par value, at \$100 a share in case of the stock issuable under the plan, and, in case of other stock, at the capital value at

which such stock is carried on the books of the company, not exceeding, however (except to the extent that earned surplus shall have been duly capitalized), the net amount received by the reorganized company on the issue thereof.

E. The first-mortgage bonds may be issued from time to time in different series, subject to the approval of this Commission or the approval of such regulatory body or tribunal as may have jurisdiction thereof, and to such limitations and restrictions as may be specified in the first mortgage, payable on such date or dates, in such denominations, bearing interest at such rates and containing such provisions in regard to redemption, conversion, taxes, place or places and money or moneys of payment, registration, and sinking funds and having such other characteristics as may be prescribed by the board of directors of the reorganized company at the time of issue, but with respect to the lien of the first mortgage all equally secured. So long as any first-mortgage bonds, series A, shall be outstanding no additional first-mortgage bonds shall be issued having a maturity earlier than January 1, 1974.

F. Ten million dollars first-mortgage bonds, series A, are to be authenticated and issued in the reorganization for the purpose of providing the \$10,000,000 of new money required in the reorganization.

The bonds of series A shall be dated January 1, 1939, shall mature January 1, 1974, shall bear interest at the rate of 4 percent per annum, payable

semiannually, and shall be redeemable, in whole or in part, at any time on 30 days' notice, at their principal amount and accrued interest, plus a premium of 3 per cent of their principal amount if redeemed on or before December 31, 1943, $2\frac{1}{2}$ percent if redeemed thereafter and on or before December 31, 1948, 2 percent if redeemed thereafter and on or before December 31, 1953, $1\frac{1}{2}$ percent if redeemed thereafter and on or before December 31, 1958, 1 percent if redeemed thereafter and on or before December 31, 1963, one-half of 1 percent if redeemed thereafter and on or before December 31, 1968, and without any premium if redeemed on or after January 1, 1969.

G. First-mortgage bonds, in addition to those to be authenticated in the reorganization, may be authenticated from time to time, subject to the approval of this Commission or such regulatory body or tribunal as may have jurisdiction thereof: (a) to refund first-mortgage bonds (excluding bonds issued solely by way of pledge, except as hereinafter provided) or outstanding obligations secured by first-mortgage bonds to the extent so secured or obligations secured by prior lien on after acquired property; or (b) upon the deposit of new cash equal to the principal amount to be issued; or (c) to provide for, or to reimburse the reorganized company for, not exceeding 75 percent of expenditures made after December 31, 1938, but not more than three years prior to the date of such authentication (including expenditures for the acquisition or construction of new railroad equip-

ment, free from other lien, but not including expenditures for the making of additions and betterments to equipment) which, under the accounting rules of this Commission or other Federal regulatory bodies having jurisdiction in the premises, at the time in force, are properly chargeable to capital account; provided, however, that

(a) Except when bonds are authenticated in respect of new mileage (or securities representative thereof) or in respect of new equipment, the said 75 percent shall be applied to the net amount of said capital expenditures after deducting therefrom, to such extent and on such basis as may be specified in the first mortgage, credits to capital account after December 31, 1938;

(b) If any first-mortgage bonds are authenticated or cash deposited under the first mortgage is withdrawn to provide or reimburse for the acquisition of railroad equipment, a sinking fund shall be established (in addition to any other sinking fund then in effect for any series of first-mortgage bonds) payable in equal annual installments in an amount sufficient to retire (at par) within the expected efficient service life of such equipment (in no case to exceed 15 years) a principal amount of first-mortgage bonds equal to (1) the principal amount of bonds so authenticated or (2) the amount of deposited cash so paid;

(c) If any property is acquired subject to existing liens the amount of additional first-mortgage bonds issuable therefor or issued to refund prior-lien obligations thereon, together with the aggre-

gate amount of existing liens to which such property is subject, shall not exceed 75 percent of the net cost thereof, including as part of such cost the amount of such existing liens whether or not the indebtedness secured thereby is assumed by the reorganized company; and

(d) No bonds shall be issued on the basis of the acquisition of equipment under equipment-trust obligations or any obligations for the deferred or serial payment of the purchase price for equipment, or on the basis of the retirement of any such obligations.

H. The first mortgage will contain a covenant substantially to the effect that no first-mortgage bonds (other than those to be authenticated under the plan) will be sold or pledged unless (1) the reorganized company shall have contracted forthwith to sell or pledge such bonds and (2) the board of directors of the reorganized company, by resolution adopted by two-thirds of the entire number of directors, shall have determined that, in the opinion of the board, taking into account market and all other relevant conditions at the time, it is impracticable to provide the amount of money needed (a) by the sale of income-mortgage bonds having a maturity of 20 years or more at a price which would give a yield to maturity of 5 percent or less, or (b) by the sale of preferred stock at a price which would give a current dividend return of 6 percent or less, or (c) by the sale of common stock at a price (not less than \$50 a share) which would give a current dividend return (based on the regular

dividend rate then in effect, or, if no regular dividend rate is in effect, on the average rate at which dividends shall have been paid during the last twelve calendar months) of 6 percent or less.

The first mortgage will also contain a covenant substantially to the effect that the excess of the aggregate principal amount of all first-mortgage bonds under pledge at any one time over the principal amount of all indebtedness so secured shall not exceed 10 percent of the aggregate principal amount of all first-mortgage bonds then authenticated and uncanceled.

I. The income mortgage shall constitute a lien, subject to the lien of the first-mortgage, upon all property from time to time subject to the lien of the first mortgage.

The income-mortgage bonds may be issued, without limit as to aggregate amount or within such limit as may be specified in the income mortgage, from time to time in different series, subject to the approval of this Commission or such regulatory body or tribunal as may have jurisdiction thereof, and subject to such limitations and restrictions as may be specified in the income mortgage, payable on such date or dates, in such denominations, bearing interest at such rates and containing such provisions in regard to accumulation of interest, redemption, conversion, taxes, place or places and money or moneys of payment, registration, and sinking funds, and having such other characteristics as may be prescribed by the board of directors of the reorganized company at the time of issue, but with

respect to the lien of the income mortgage all equally secured. No interest shall be mandatorily payable on income-mortgage bonds of any series (except at maturity or redemption) except out of available net income, as hereinafter provided.

J. Twenty-one million two hundred nineteen thousand seventy-five dollars of income-mortgage bonds, series A, are to be authenticated and issued in the reorganization, as set out in subdivision P below.

The income-mortgage bonds of series A shall be dated January 1, 1939, shall mature January 1, 2014, shall bear interest at the rate of $4\frac{1}{2}$ per cent per annum, due and payable as hereinafter provided, and shall be redeemable, in whole or in part, on May 1 in any year, on 30 days' notice, at their principal amount plus (a) full interest for the last preceding year and all unpaid accumulated interest for prior years and (b) interest at the rate of $4\frac{1}{2}$ percent per annum from the last preceding December 31 to the redemption date.

The income-mortgage bonds of series A shall be convertible into shares of common stock, as at the time constituted, at any time at the rate of 20 shares per \$1,000, principal amount, of such bonds.

Interest on income-mortgage bonds, series A, accruing for each calendar year shall (up to the limits of accumulation hereinafter specified) become absolutely due as a debt on December 31 in such year, but shall be payable on May 1 of the next succeeding year or thereafter as provided below. Such interest shall be mandatorily payable (except as hereinafter

provided) only out of available net income of the reorganized company that remains after providing for the capital fund and charges prior thereto (i.e., that remains after the deductions made pursuant to subparagraphs (1) and (2) of the fourth paragraph of subdivision L). All interest that comes due and is not paid on the next following May 1 shall accumulate up to the maximum amount of 13½ per cent at any one time, but not beyond. Accumulated interest shall be mandatorily payable (a) whenever, and to the extent that, there is available net income for any subsequent year remaining after the deductions made pursuant to said subparagraphs (1) and (2) of the fourth paragraph of subdivision L (in which case such amount shall be paid on the next following May 1), or (b) in any event (whether earned or not) at the maturity or on redemption of the income-mortgage bonds of series A. For the purposes of the two sentences next hereinabove, payment of interest shall be considered as applied to interest accrued for the last preceding calendar year before being applied to accumulations. The board of directors of the reorganized company may at any time, in its discretion, pay any interest accrued on the income-mortgage bonds, series A, even if not earned, out of any funds lawfully available therefor.

The income mortgage will provide for the payment on May 1 of each year while any income-mortgage bonds, series A, are outstanding, of an installment of the sinking fund, if earned, as, and in the amount, hereinafter specified. Such installment

shall be payable only out of available net income for the last preceding calendar year that remains after paying interest on outstanding income-mortgage bonds (i.e., that remains after the deductions made pursuant to subparagraphs (1), (2) and (3) of the fourth paragraph of said subdivision L). The amount of such installment shall equal (a) one-half of 1 percent of the maximum principal amount of income-mortgage bonds, series A, theretofore at any one time authenticated and uncanceled, plus (b) an amount equal to interest on all income-mortgage bonds, series A, theretofore purchased or redeemed out of the sinking fund, calculated at the rate paid on said May 1 upon outstanding income-mortgage bonds of series A. Such accruals of the sinking-fund installments shall not be cumulative. The sinking fund shall be applied from time to time to the retirement of income-mortgage bonds, series A, by purchase in the open market or by call for tenders at not exceeding their redemption price, and whenever the amount in the sinking fund exceeds \$50,000 and income-mortgage bonds, series A, are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the sinking fund shall be applied to the redemption of the income-mortgage bonds, series A, on the next succeeding interest payment date. All bonds so acquired shall be canceled and no bonds may be issued to refund any such bonds.

Income-mortgage bonds, in addition to those to be issued in the reorganization, may be issued from

time to time, subject to the approval of this Commission or of such regulatory body or tribunal as may have jurisdiction thereof, to refund outstanding income-mortgage bonds or in lieu of first-mortgage bonds, for the purposes and subject to the restrictions stated in respect of the issue of additional first-mortgage bonds above, to the extent that first-mortgage bonds are not issued for such purposes.

K. No income-mortgage bonds (other than those to be issued under the plan) may be authenticated and delivered unless (1) the reorganized company shall have contracted forthwith to sell or pledge such bonds and (2) the board of directors of the reorganized company, by resolution adopted by two-thirds of the entire number of directors, shall have determined that, in the opinion of the board, taking into account market and all other relevant conditions at the time, it is impracticable to provide the amount of money needed (a) by the sale of preferred stock at a price which would give a current dividend return of 6 percent or less, or (b) by the sale of common stock at a price (not less than \$50 a share) which would give a current dividend return based on the regular dividend rate then in effect, or, if no regular dividend rate is in effect, on the average rate at which dividends shall have been paid during the last 12 calendar months) of 6 percent or less.

The income mortgage will also contain a covenant substantially to the effect that the excess of the aggregate principal amount of all income-mortgage

bonds under pledge at any one time over the principal amount of all indebtedness so secured shall not exceed 10 percent of the aggregate principal amount of all income-mortgage bonds then authenticated and uncanceled.

The income mortgage will provide, within conditions and limits to be therein prescribed, for the modification and alteration thereof and of the rights and obligations of the reorganized company and of the holders of the income-mortgage bonds thereunder, at any time by the concurrent action of the reorganized company and of the holders of not less than $66\frac{2}{3}$ percent in aggregate principal amount of the bonds then outstanding; provided, however, that no such change or modification shall alter or impair the obligation of the reorganized company to pay the principal of any bond without the consent of the holder of such bond. In the event of any unification of the properties of the reorganized company with the properties of any other company, the modifications hereinabove authorized may include provisions excluding in whole or in part the earnings from such other properties in determining available net income and providing for the determination of such available net income without the maintenance of separate accounts.

L. Available net income shall be determined for each calendar year beginning with the year 1939, and continuing thereafter so long as any income-mortgage bonds remain outstanding. When no income-mortgage bonds remain outstanding, the pro-

visions of this subdivision L shall cease to be operative.

Available net income for each such calendar year shall be determined by deducting all fixed charges of the reorganized company and its wholly owned railway subsidiaries accrued during such calendar year from the consolidated income of the reorganized company and its wholly owned railway subsidiaries available for fixed charges for such calendar year (determined in accordance with the accounting rules of this Commission or other analogous Federal authority having jurisdiction in the premises at the time in force, or, to the extent not governed by such accounting rules, in accordance with sound accounting practice); provided, however, that if the reorganized company shall not come into ownership and possession of the properties now operated by the bankruptcy trustees on or before January 1, 1939, available net income for any period after January 1, 1939, until the reorganized company comes into ownership and possession of such properties shall be computed as if the reorganized company had come into such ownership and possession on January 1, 1939, and had issued, as of that date, the new securities issuable under the plan, other than the \$10,000,000 of new first-mortgage bonds, series A, and in lieu of interest on such bonds there shall be charged the amount of interest actually accruing during such period upon any then outstanding trustees' certificates or other obligations issued to provide funds for rehabilitation purposes.

Available net income shall be ascertained for each such calendar year, as the accounts shall be stated on the books of the reorganized company during such calendar year, without adjustments, except that (1) in determining available net income there shall not be deducted any amounts from the proceeds of the trustees' certificates issued for rehabilitation purposes, notwithstanding that under the accounting rules hereinbefore mentioned such expenditures may be chargeable as operating expenses; (2) if in respect of any calendar year the available net income is a deficit, the amount of such deficit may, in the discretion of the board of directors of the reorganized company, be carried forward and be deducted in determining available net income for the succeeding calendar year or calendar years until such deficit (or accumulated or remaining deficits) be extinguished by earnings which in the absence of such deficit or deficits, would be available net income; and (3) debits or credits to adjust income in prior years shall be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss accounts, so far, but only insofar, as such debits and credits reflect cash receipts or disbursements in the year in which they are entered on the books.

Available net income for each calendar year shall be applied to the following purposes and in the following order:

(1) to the creation, if and when the aggregate principal amount of first-mortgage bonds outstand-

ing shall equal or exceed \$20,000,000, of the sinking fund provided for in subdivision D hereinabove, in an amount up to, but not exceeding, in respect of any calendar year, one-half of 1 percent of the maximum principal amount of first-mortgage bonds theretofore at any one time authenticated and uncanceled.

(2) To the creation of a capital fund to be applied to, or to provide for, or to reimburse the treasury of the reorganized company for, capital investments, as defined by this Commission's Classification of Income, Profit and Loss, and General Balance Sheet Accounts for Steam Roads, Accounts Nos. 701, Investment in road and equipment, 702 Improvements on leased railway property, and 705, Miscellaneous physical property (or advances to subsidiaries for expenditures which, if made directly by the reorganized company in respect of its owned or leased properties, would be charged to said accounts), or such substituted accounts as may at the time be in effect, to the extent that such capital investments have been made or contracted for during such calendar year or within three months thereafter, and including therein (but only to the extent that such payments during such calendar year shall exceed depreciation of equipment charged against income for such calendar year) payments made for new equipment, or initial and principal payments upon equipment leased under equipment trusts or purchased under conditional-sale agreements and installments of sinking fund provided for by subparagraph (b) of subdivision G

(relating to first-mortgage bonds issued for equipment), provided, however, that

(a) The amount set aside in the capital fund each calendar year shall be \$500,000 less amounts charged during the calendar year to operating expenses in respect of retirements of road property, and in respect of depreciation of road property if reserves for depreciation of road property be established, provided that the amount in the capital fund at the end of the calendar year, including the amount set aside for the fund in respect of that calendar year, shall not exceed \$1,000,000.

(b) The capital fund may be applied only to such part of the cost of capital investments as hereinabove defined as remains after deducting from such cost the amounts charged to operating expenses for retirement of road property and all amounts charged to operating expenses for any reserves for depreciation of road property that may be established.

(c) To the extent that expenditures are so provided for or reimbursed out of the capital fund, the company shall not thereafter have the right to issue any bonds or other evidences of indebtedness or any stock ranking, as to either assets or dividends, in priority to, or on a parity with, the preferred stock of series A to capitalize or reimburse such expenditures; provided, however, that such expenditures (if for purposes for which first-mortgage bonds or income-mortgage bonds may be issued) may, within such limits, if any, as may be specified in the first mortgage or the income mort-

gage, be used to supply, in whole or in part, the excess of capital expenditures required to be certified under either such mortgage over the principal amount of the bonds that may be issued under the terms thereof; and

(3) Any then remaining available net income for any calendar year shall be applied to the payment on the next succeeding May 1, of interest on the then outstanding income-mortgage bonds (not including any thereof then held in any sinking fund) accrued during the last preceding calendar year, and of any accumulated unpaid interest thereon.

(4) Any then remaining available net income for any calendar year shall be applied, so long as any income mortgage bonds, series A, are outstanding, to the payment on the next succeeding May 1, of the sinking fund installment provided for in subdivision J (relating to income-mortgage bonds, series A).

(5) Any then remaining available net income for any calendar year may be applied to the creation of a sinking fund for income-mortgage bonds of series other than series A, if any such sinking fund shall have been provided for at the time of the creation of any such series.

(6) Any then remaining available net income for any calendar year shall be applied to the payment on the next succeeding May 1 of the installment, if any, then due under the sinking fund provisions of subdivision D hereinabove (relating to

first-mortgage bonds when outstanding in excess of certain limits).

(7) Any then remaining available net income for any calendar year may be applied to any proper corporate purpose of the reorganized company (except dividends on the new common stock), including, if and to the extent that such dividends shall be declared by the board of directors of the reorganized company, the payment of dividends upon the preferred stock in respect of such year and of any accrued and unpaid cumulative dividends on the preferred stock; such dividends to be paid, except as hereinafter provided, on such date or dates in the next succeeding year as may be specified in the certificate of incorporation or by-laws of the reorganized company, or in the certificates for the preferred stock.

(8) Any then remaining available net income for any calendar year may be applied to any proper corporate purpose of the reorganized company, including (but only after all accrued and unpaid cumulative dividends on the preferred stock to the end of such year shall have been paid, or declared and set apart for payment) dividends on the common stock.

No interest need be paid on income-mortgage bonds if the amount to be paid is less than one-fourth of 1 percent. Any excess available for interest but not paid because of the foregoing provision shall be reserved and added to the income available for interest on the income-mortgage bonds for the next succeeding calendar year.

If there are outstanding income-mortgage bonds of different series, the amount applicable to interest on such bonds shall be distributed among the respective series in proportion to the unpaid interest at the time accumulated on the bonds of such series, respectively.

Dividends may be paid on stock of any class (subject to the relative rights of the several classes of stock) out of the income of any calendar year prior to the close of such calendar year if, but only if, prior to the declaration of such dividends, the board of directors shall have determined that the available net income for such year applicable for the purposes specified in the foregoing paragraphs (1), (2), (3), (4), (5), and (6) will be more than sufficient to pay the amounts payable out of such available net income pursuant to said paragraphs and such amounts shall have been deposited in trust for the purposes specified in said paragraphs. Dividends on common stock may be so declared only if, prior to such declaration, the board of directors shall have determined that the applicable part of available net income for such year will be more than sufficient to pay the amount hereinabove specified for dividends (including accumulations) on the preferred stock and such amount shall have been deposited in trust for the purpose of paying such dividends.

M. There will be authorized 750,000 shares of preferred stock, each of the par value of \$100, of which 318,502 $\frac{97}{100}$ shares of series A are to be

issued in the reorganization as set out in subdivision P below.

The additional authorized preferred stock not issued in the reorganization will be issuable from time to time, subject to the approval of this Commission, or of such regulatory body or tribunal as may have jurisdiction thereof, in the discretion of the board of directors of the reorganized company, but (unless for purposes for which first-mortgage bonds might otherwise have been issued) only after the concurring vote or consent of the holders of a majority of the outstanding preferred stock. So far as permitted by law, such additional preferred stock may be of series A, or of any other series, one or more, and preferred stock of any such other series may bear dividends at such rate, cumulative noncumulative, may be redeemable or nonredeemable, convertible or nonconvertible, and may have such other rights and privileges and be subject to such limitations and restrictions, as may be from time to time determined by the board of directors prior to the issue of preferred stock of any such other series. If there are outstanding shares of preferred stock of different series, the earnings applicable to dividends thereon shall be apportioned among the respective series in proportion to the dividends accumulated on the shares of such series respectively.

In any liquidation or winding up of the reorganized company, whether voluntary or involuntary, the preferred stock shall be entitled to receive, out of the assets of the reorganized company, its

par value, plus any accrued and unpaid cumulative dividends thereon, plus such premium, if any, as may be specified for any series, before any distribution shall be made on the common stock, but shall not be entitled to any further participation in such assets.

The reorganized company shall not, without the vote or consent of the holders of at least two-thirds in par value of the outstanding new preferred stock, (1) create or permit to be created any mortgage or other lien upon any of its properties, excepting the new first mortgage, the new income mortgage, or purchase money liens (including equipment obligations) upon property hereafter acquired, given for not more than 75 percent of the purchase price of such property; (2) create or issue any bonds, notes, or other evidences of indebtedness maturing more than two years from their date, except new first-mortgage bonds and new income-mortgage bonds and except purchase money obligations given for not more than 75 percent of the purchase price of property hereafter acquired; (3) create any stock ranking, either as to assets or dividends, in priority to, or on a parity with, the new preferred stock, or (4) permit any subsidiary, all of the stock of which, except directors' shares, shall be owned by the reorganized company, to create any mortgage or other lien upon any of its properties or issue any bonds, notes, or other evidences of indebtedness (except purchase money liens or obligations limited as aforesaid), or issue any additional stock of any class, unless the obligations secured by such mort-

gage or other lien or such other obligations or such stock shall be acquired by the reorganized company.

The preferred stock, series A, shall be entitled to receive all accumulated unpaid dividends and current dividends at the rate of 5 percent per annum in respect of any calendar year before any dividends shall be paid or declared or set apart for payment on the common stock in respect of such year. Such dividends shall be cumulative to the extent earned in any calendar year but not paid; but such dividends shall otherwise be noncumulative. For the purposes of the next preceding sentence hereinabove, preferred stock dividends shall be considered to be earned in any calendar year to the extent covered by the available net income for such year that remains after providing for prior charges (i.e., that remains after the deductions made pursuant to sub-paragraphs (1), (2), (3), (4), (5), and (6) of the fourth paragraph of subdivision L); or after the provisions of said subdivision L shall have ceased to be operative, to the extent covered by net income as defined by the accounting rules or practice referred to in said subdivision L).

After dividends shall have been paid or declared, or set apart for payment, on the new common stock at the rate of \$3 a share in respect of any year, each share of preferred stock, series A, shall be entitled to share equally with each share of new common stock in any dividends paid or declared or set apart for payment, in respect of such year.

The preferred stock, series A, shall be redeem-

able, in whole or in part, at any time at its par value plus accrued and unpaid cumulative dividends, and proportionate dividend for the current year.

The holders of preferred stock, series A, shall not have any preemptive right to subscribe to any additional issues of stock of any class or of securities convertible into stock of any class.

Holders of preferred stock shall be entitled to one vote per share on all matters, except that in elections of directors, which shall be by cumulative voting each holder of stock of either class shall be entitled to as many votes per share as the number of directors to be elected.

N. There will be authorized 1,000,000 shares of common stock, without par value, of which 319,441 shares are to be issued in the reorganization as set forth in subdivision P below and 424,382 shares shall be reserved for the conversion of income-mortgage bonds, series A. No new common stock additional to that actually issued in connection with the reorganization, as above stated, shall be issued without the further authorization of this Commission or of such regulatory body or tribunal as may have jurisdiction thereof.

Holders of common stock shall be entitled to one vote per share on all matters except that directors shall be elected by cumulative voting as aforesaid.

So far as permitted by law, any vote or consent by the holders of common stock, authorizing the issue of additional shares of stock of any class or of securities convertible into stock of any class,

may waive on such terms and conditions, if any, as may be specified in such vote or consent, the preemptive right of all the holders of shares of common stock to subscribe to such additional shares or securities.

O. The \$10,000,000 of new first-mortgage bonds, series A, to be authenticated and issued in the reorganization shall be sold at par and accrued interest to the Reconstruction Finance Corporation (subject to the approval and authorization of this Commission and the delivery to the Reconstruction Finance Corporation of a legal opinion satisfactory to it as to the validity of the acquisition by the reorganized company of title to the properties of the debtor and the validity of the new first-mortgage bonds, series A, and the new first mortgage). In consideration of such purchase by the Reconstruction Finance Corporation of new first-mortgage bonds, series A, and considering the value of the collateral securing its claim, such claim amounting as of January 1, 1939, to \$3,862,870 (\$2,963,000 principal and \$899,970 interest) and represented by notes secured by general and refunding bonds of the debtor and other collateral, shall be provided for under the plan in like securities and in like proportions as those given holders of the debtor's first-mortgage bonds.

P. The existing securities of the debtor shall be treated as follows:

1. Existing equipment trusts, Baldwin lease, and Pullman contract, aggregating \$2,750,050 shall re-

main undisturbed and shall be assumed by the reorganized company.

2. Holders of existing first-mortgage bonds shall receive for each \$1,000, principal amount thereof, together with \$266.66 $\frac{2}{3}$ of interest accrued and unpaid thereon to January 1, 1939, approximately \$400 of income-mortgage 4 $\frac{1}{2}$ -percent bonds, series A (being 40 percent of the principal amount of said existing bonds); \$600 of 5-percent preferred stock, series A (being 60 percent of the principal amount of said bonds); and 4.67 shares of common stock (being common stock taken at the price of \$57 a share for 100 percent of said accrued and unpaid interest).

3. The Reconstruction Finance Corporation shall receive in respect of the \$10,000,000 of new money provided for in subdivision O (or the surrender of trustees' certificates at their principal amount and accrued interest, to a like amount) and its existing claim in the principal amount of \$2,963,000, together with \$899,870 of interest accrued and unpaid thereon to January 1, 1939, approximately \$10,000,000 of new first-mortgage 4-percent bonds, series A (being 100 percent of said new money); \$1,185,200 of income-mortgage 4 $\frac{1}{2}$ -percent bonds, series A (being 40 percent of the principal of said claim); \$1,777,800 of 5-percent preferred stock, series A (being 60 percent of the principal of said claim); and 15,788 shares of common stock (being common stock taken at the price of \$57 a share for 100 percent of said accrued and unpaid interest).

4. The Railroad Credit Corporation shall receive

in respect of its claim in the principal amount of \$2,445,610, together with \$146,503 of interest accrued and unpaid thereon to January 1, 1939 (subject to the reduction of said amounts by the application, prior to the date of issue of the new securities under the plan, of any proceeds from the distributive shares of the company of its subsidiaries under the marshaling and distributing plan, 1931), approximately \$154,111 of income mortgage 4½-percent bonds, series A; \$241,681 of 5-percent preferred stock, series A; and 35,425 shares of common stock (being common stock taken at the price of \$62 per share). The Railroad Credit Corporation's equity in the collateral securing the claim of the Reconstruction Finance Corporation is found to be without value.

5. The A. C. James Company shall receive in respect of its claim in the principal amount of \$4,999,800, together with \$1,249,950 of interest accrued and unpaid thereon to January 1, 1939, \$163,724 of income mortgage 4½-percent bonds, series A; \$256,756 of 5-percent preferred stock, series A; and 37,635 shares of common stock (being an amount of common stock which bears to the amount of common stock allotted to the claim of the Railroad Credit Corporation the same proportion that the principal amount of general and refunding mortgage bonds of the debtor held by the A. C. James Company as collateral for said claim, bears to the principal amount of such bonds held by the Railroad Credit Corporation for its claim).

6. The unsecured claims of the Western Pacific

Railroad Corporation and the Western Realty Company, and other unsecured claims not entitled to priority over existing mortgages, are found to be without value, and no securities or cash shall be distributed under the plan in respect of these claims.

7. The capital stock of the debtor is found to be without equity or value, and the stockholders shall not be entitled to participate in the plan.

Q. Claims against the debtor entitled to priority over any mortgage of the debtor, current liabilities and obligations incurred by the trustees of the properties of the debtor during the reorganization proceeding, and expenses of reorganization allowed by the court within the maximum fixed by this Commission shall be paid in cash or assumed by the reorganized company, provided that any amounts so assumed by the reorganized company shall constitute a charge upon the properties of the reorganized company prior in lien to all new securities issued under the plan. When so treated, claims against the debtor entitled to priority over any of its mortgages are found not to be affected by the plan. Obligations under the debtor's equipment-trust certificates, the Baldwin lease, and the Pullman contract are found not to be materially and adversely affected by the plan. The reorganized company shall be deemed to have assumed the executory contracts of the debtor which by their terms do not terminate at or prior to the conclusion of the reorganization proceeding and which shall have been affirmed or shall not have been disaffirmed by the trustees of the properties of the debtor with the approval of

the court prior to the confirmation of the plan, and also any executory contracts made by the trustees of the properties with the approval of the court which by their terms do not terminate at or prior to the conclusion of the reorganization proceeding.

R. The capital stock of the debtor and the unsecured claims against the debtor not entitled to priority over existing mortgages shall be canceled.

Existing mortgages on the debtor's properties shall be released and canceled, and all funds on deposit with the trustees under the debtor's mortgages representing sums paid from time to time to such trustees for the release of properties, sale of scrap, and other wise, and all collateral pledged under the debtor's mortgages, shall be surrendered to the reorganized company free from liens of the debtor's mortgages, after deductions therefrom of any amounts which the court may find should be deducted under the provisions of such mortgages and consistent with this plan. All collateral pledged by the debtor as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company shall be reduced to possession by the respective pledges thereof, and shall be by them surrendered to the reorganized company and canceled, except that the Railroad Credit Corporation shall not release or surrender any right or interest in the distributive shares of the debtor or its subsidiaries under the marshaling and distributing plan, 1931, but any proceeds from such distributive shares after the effective date of the plan shall become the property of

and be retained by the Railroad Credit Corporation, but to the extent to which received prior to the issue of the new securities under the plan shall be applied in reduction of the claim of the Railroad Credit Corporation in respect of which such new securities are to be issued at the rates provided in subdivision P. The court by orders of March 11, 1936, and March 20, 1936, authorized the Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor all outstanding first-mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment. Any such coupons as shall not have been presented for payment up to the time of the consummation of the plan shall be paid in cash by the new company if and when presented by the holders thereof.

The plan shall be carried out under the supervision of a reorganization committee consisting of three persons, all to be approved by the court, who shall be designated, one by the bondholders committee, one by the Reconstruction Finance Corporation, and one by the Railroad Credit Corporation and the A. C. James Company jointly. Should the bondholders committee, or the Reconstruction Finance Corporation, or the Railroad Credit Corporation and the A. C. James Company jointly, fail to designate a representative for membership on the committee within such time as the court shall consider reasonable, the court shall appoint such a representative.

The plan may be carried out either by revesting the properties formerly of the debtor in the debtor company or by transferring said properties to a new corporation organized for the purpose, and the execution by the corporation in which said properties are vested of the new mortgages and the issue by it of the new securities contemplated by the plan.

The method of carrying out the plan shall be determined by the reorganization committee in its discretion, and the reorganization committee shall also determine, subject to the approval of the court, the form, and, except as herein otherwise expressly provided, the provisions, of all mortgages, bonds, coupons, charters, by-laws, stock certificates, voting trust certificates, acceptances, assents, and all other instruments in the judgment of the reorganization committee necessary or desirable in connection with carrying out the plan.

The reorganization committee may act by a majority of its members as from time to time constituted, at a meeting or in writing without a meeting. The reorganization committee may employ such agents, attorneys, and others as it may deem desirable for the purposes of the plan. The reorganization committee may from time to time delegate to others any power or discretion conferred upon it by the plan; and the members of the reorganization committee shall not be liable for any action taken by them in good faith or by any person employed by the reorganization committee in good faith, except for their respective individual malfeasance or wilful neglect.

Should the reorganization committee solicit deposits of securities, or authorization to represent

holders of the debtor's existing security in the reorganization, the terms and conditions upon which such solicitation and representation would be made shall be subject to the prior approval of this Commission.

S. If deemed desirable and so ordered by the Court, the plan, after it has been found fair and equitable and confirmed by the court, may be executed by a sale at not less than a fair upset price to be fixed by the court, of all or any part of the property of the debtor, all on such conditions and in such manner as the court may direct. Upon any such sale the property and assets offered for sale may be purchased for the benefit of the reorganized company by the reorganization committee, and in that event there shall be applied on account of the purchase price the distributive share of the proceeds of such sale of all securities the holders of which shall have assented to the plan, and of the securities, though not assenting to the plan, of all classes which shall have accepted the plan.

In the event of a sale of the properties of the debtor to the reorganization committee, the committee may in its discretion sell all or any portion of the new securities, if any, distributable under the plan to holders of existing securities, if neither such security holder nor the class to which such security holder belongs shall have accepted the plan, provided that security holders in a class which shall not have accepted the plan, and who themselves shall not have accepted the plan shall have the right, if they shall so notify the committee within a period of 30 days after the confirmation

of such sale, to assent to the plan and receive the securities allocated to them under the plan in lieu of their aliquot share of the proceeds of such sale of the properties. The proceeds of any such sale of securities may be used to pay the portion of the purchase price payable in cash on any such sale of the properties.

T. Unless otherwise provided in section 77 or any order or orders of the court in the reorganization proceeding or of this Commission, whenever notice shall be required or permitted to be given under or pursuant to the plan, such notice shall be given by publishing a copy of such notice once in each week on any secular day in each such week for two successive weeks in one newspaper published and of general circulation in the Borough of Manhattan, City and State of New York, and in one newspaper published and of general circulation in the City of San Francisco, State of California, and also (1) in case of notices to security holders who have accepted the plan, by mailing such notice, postage prepaid, to the addresses of such security holders set forth in the acceptances signed by them; and (2) in case of notices to security holders who shall not have accepted the plan, by mailing such notice, postage prepaid, to such security holders whose names and addresses appear on the books of the debtor or of the reorganized company, as the case may be, but failure to mail any such notices, or delay in mailing any such notices, shall not invalidate the notice by publication above provided for, which alone shall be sufficient.

U. The board of directors of the reorganized

company shall consist of not less than 7 nor more than 11 members, who shall be elected by the holders of the preferred stock and the common stock of the reorganized company at an election to be held not later than 90 days after the consummation of the plan. Pending such election the board of directors shall consist of such persons as may be designated by the reorganization committee, with the approval of the court.

V. The construction of the plan by the court shall be final and conclusive. The court may cure any defect, supply any omission, or reconcile any inconsistency in such manner or to such extent as may be necessary or expedient in order to carry out the plan effectively.

W. Acceptance of the plan shall include acceptance of the new bonds, mortgages, stock certificates, and all instruments necessary and appropriate to the carrying out of the plan, other than the orders of the court and this Commission, to the same effect as though the terms of such instruments were set out in full herein.

Notwithstanding any other provisions of this modified order, the reorganized company shall assume the liability for, and shall pay in full in due course, any and all taxes due to the United States from the debtor or the debtor's trustee for any taxable period prior to the date of the confirmation of the plan, whether or not proof thereof has been made in the proceeding and without prejudice by reason of not having made proof thereof.

It is further ordered, that the authorization and

approval herein granted by this Commission are upon the condition that the journal entries covering the necessary accounting adjustments under the order will be submitted to this Commission for approval before they are recorded on the books of the reorganized company under the plan of reorganization herein approved;

It is further ordered, that nothing herein contained shall be, or be construed as, a grant of authority for the issue of any securities, assumption of obligations, transfer of any property, sale consolidation, or merger of the debtor's properties, or pooling of traffic, pursuant to either the Bankruptcy Act or the Interstate Commerce Act, except as provided herein, or until further action by this Commission upon confirmation of the plan by the court; and

It is further ordered, that the order herein, dated October 10, 1938, be, and it is hereby, revoked.

By the Commission.

(Seal)

W. P. BARTEL,
Secretary.

[Endorsed]: Filed July 29, 1939.

[Title of District Court and Cause.]

ORDER APPROVING PLAN OF REORGANIZATION FOR DEBTOR

These proceedings come on for hearing on the modified plan of reorganization for the Debtor, approved by the Interstate Commerce Commission in

its Report and Order entered June 21, 1939, and certified to this Court by said Commission on September 28, 1939, together with a transcript of the proceedings before said Commission and a copy of its said Report and Order approving said modified plan, and the Court having considered the entire record in these proceedings, including the transcript of the proceedings before said Commission certified to this Court and the evidence adduced and arguments presented at the hearing before this Court on January 22 to 25, 1940, and the Court having heretofore on August 15, 1940, filed its opinion herein.

The Court Finds:

1. The findings of fact made by the Interstate Commerce Commission in its Original Report on October 10, 1938, as modified by its Supplemental Report of June 21, 1939, are supported by the evidence, and as supplemented by the stipulation of the parties filed herein on December 20, 1939, are adopted as findings by this Court.

2. The Plan of Reorganization, approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939:

(a) Includes provisions modifying and altering the rights of creditors of the Debtor:

(b) Provides for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property, in light of its earnings experience and all other relevant facts, there should be

adequate coverage of such fixed charges by the probable earnings available for the payment thereof;

(c) Provides adequate means for the execution of the Plan; and

(d) In all other respects complies with the provisions of Subsection (b) of Section 77.

3. Said Plan of Reorganization:

(a) Is fair and equitable;

(b) Affords due recognition to the rights of each class of creditors and stockholders;

(c) Does not discriminate unfairly in favor of any class of creditors or stockholders;

(d) Will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; and

(e) Provides for payment of all costs of administration and all other allowances made or to be made by this Court.

4. By order entered August 15, 1940, this Court fixed the amount to be paid by the Debtor, or any corporation acquiring its assets, for fees and expenses incident to the reorganization through October 31, 1939. Said amounts are reasonable and within maximum limits heretofore fixed by the Interstate Commerce Commission and said order constitutes full disclosure of the approximate amounts to be paid by the Debtor, or such other corporation, for such fees and expenses so far as they could be ascertained at the date of said hearing before this Court on January 22 to 25, 1940. Such additional amount as may be required to be paid by the Debtor or such other corporation for services performed and expenses incurred (including reasonable attorneys'

fees) after October 31, 1939, in connection with the proceeding and plan of reorganization, and in connection with the carrying out of said plan, if the same is finally confirmed, cannot be ascertained at this time, but such amounts will be subject to the approval of this Court within maximum limits hereinafter to be fixed by the Interstate Commerce Commission.

5. By order entered August 20, 1935, this Court divided the creditors and stockholders of the Debtor into classes and the classes of creditors hereinafter referred to are those fixed by said order.

Wherefore, It Is Ordered:

First: The objections to the Plan of Reorganization approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939, and the claims for equitable treatment heretofore filed herein by or on behalf of the Debtor, the Institutional Bondholders Committee, the Trustee under the Debtor's General and Refunding Mortgage, A. C. James Co., Reconstruction Finance Corporation, The Railroad Credit Corporation, The Western Pacific Railroad Corporation and The Western Realty Company are hereby severally overruled and denied.

Second: Said Plan of Reorganization is hereby in all respects approved.

Third: The findings made by the Interstate Commerce Commission that the interests of the following classes of creditors:

(a) The Debtor's equipment obligations to be assumed by the Reorganization Company, being classes 6, 7, 8 and 9;

(b) Claims against the Debtor entitled to priority over any mortgage of the Debtor, current liabilities and obligations incurred by the Trustees of the

Debtor during this reorganization proceeding, and expenses of reorganization allowed by this Court within the maximum limits fixed by the Interstate Commerce Commission, which shall be paid in cash or assumed by the Reorganized Company, and which are unclassified;

(c) Executory contracts of the Debtor which have been affirmed or have not been disaffirmed by the Trustees of the Debtor and not terminating prior to the conclusion of this reorganization proceeding which are to be assumed by the Reorganized Company and which are unclassified;

(d) Executory contracts made by the Trustees of the Debtor with the approval of this Court which by their terms do not terminate at or prior to the conclusion of the reorganization proceeding, which are to be assumed by the Reorganized Company, and which are unclassified; and

(e) All taxes levied, assessed or accrued against the Debtor or its property or against any subsidiary and remaining unpaid at the date of the confirmation of the plan, which are to be assumed and paid by the Reorganized Company with the same relative priority that they now have with respect to other obligations of the Debtor;

will not be adversely and materially affected by said Plan of Reorganization is hereby affirmed, and said Plan of Reorganization shall not be submitted to any of such classes for acceptance or rejection.

Fourth: The finding of the Interstate Commerce Commission that, at the time of the finding, the interests of unsecured creditors of the Debtor and

the equity of the holders of the Debtor's Preferred Stock and the Debtor's Common Stock have no value, and that the holders of such unsecured claims and such shareholders are not entitled to participate in the distribution of new capital securities or other assets of the Debtor under said Plan of Reorganization is hereby affirmed, and said Plan of Reorganization shall not be submitted to said unsecured creditors or shareholders for acceptance or rejection.

Fifth: The only classes of creditors to whom said Plan of Reorganization shall be submitted for acceptance or rejection are:

(a) Class (1)—holders of claims evidenced by The Western Pacific Railroad Company First Mortgage 5% Bonds due March 1, 1946, issued under the First Mortgage of The Western Pacific Railroad Company dated June 26, 1916, and the interest coupons appurtenant thereto;

(b) Class (3)—Debtor's secured promissory notes issued to A. C. James Co., dated March 28, 1932, and May 31, 1932, respectively, bearing interest at the rate of 5% per annum and due March 28, 1935, and May 31, 1935, respectively, together with the accrued and unpaid interest thereon;

(c) Class (4)—Debtor's secured promissory notes to Reconstruction Finance Corporation, dated March 1, 1932, June 29, 1932, August 1, 1932, August 30, 1932, and March 25, 1933, respectively, bearing interest at the rate of 6% per annum, and due March 1, 1935, June 29, 1935, August 1, 1935, August 30, 1935, and March 25, 1936, respectively, together with accrued and unpaid interest thereon;

(d) Class (5)—Debtor's secured promissory notes

to The Railroad Credit Corporation, dated June 29, 1932, and March 25, 1933, respectively, bearing interest at the rate provided for in the Marshalling and Distributing Plan, 1931, of The Railroad Credit Corporation, each note payable on demand, together with accrued and unpaid interest thereon.

Sixth: T. M. Schumacher and Sidney M. Ehrman, Trustees of the Debtor, be, and they are hereby directed to send a certified copy of this Order and a certified copy of the opinion of this Court filed herein on August 15, 1940, to the Interstate Commerce Commission for use in submitting said Plan of Reorganization hereby approved to the holders of said claims and interests found to be entitled to vote thereon.

Dated August 15, 1940.

/s/ A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Aug. 15, 1940.

[Title of District Court and Cause.]

ORDER CONFIRMING PLAN OF REORGANIZATION

These proceedings coming on for further hearing pursuant to the order of this Court entered herein on September 22, 1943, and upon the notice provided to be given by said order, for the purpose of determining whether or not the plan of reorganization heretofore approved by the order of this Court entered herein on August 15, 1940, shall be confirmed, and this Court having considered the record in these

proceedings and having heard all parties in interest desiring to be heard in support of or in opposition to the confirmation of said plan of reorganization and being fully advised in the premises,

The Court Finds:

1. Due notice of said hearing has been given in accordance with said order of this Court entered herein on September 22, 1943.

2. This Court has jurisdiction of the subject matter of these proceedings and of all of the parties in interest.

3. On July 15, 1943, in conformity with subsection (e) of Section 77 of the Bankruptcy Act, as amended, said plan of reorganization was duly submitted by the Interstate Commerce Commission for acceptance or rejection to the creditors of Classes 1, 3, 4 and 5. In view of the findings of the Interstate Commerce Commission contained in its order dated June 21, 1939, in Finance Docket No. 10913, and the findings of this Court contained in said order entered herein on August 15, 1940, submission of said plan of reorganization to any other class of creditors or to any class of stockholders is not necessary under subsection (e) of Section 77 of the Bankruptcy Act, as amended.

4. On September 15, 1943, the Interstate Commerce Commission duly filed herein its certificate dated September 4, 1943, in which it duly certified to the Judge of this Court the results of said submission.

5. Said plan of reorganization has been duly accepted by or on behalf of creditors of each class to which submission is required under subsection (e)

of Section 77 of the Bankruptcy Act, as amended, holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan of reorganization, submission of said plan of reorganization to any class of stockholders not being required under said subsection (e), and such acceptances have not been made or procured by any means forbidden by law.

6. The United States is not a creditor of the Debtor on claims for taxes or customs duties, unless it be on claims for the payment of which said plan of reorganization duly provides.

7. All requirements for the confirmation of said plan of reorganization pursuant to Section 77 of the Bankruptcy Act, as amended, have been duly complied with, and said plan of reorganization should be confirmed.

8. This Court has this day filed herein an opinion containing a statement of the Court's conclusions and reasons for confirming said plan of reorganization.

9. Article R of said plan of reorganization, among other things, provides:

“The plan shall be carried out under the supervision of a reorganization committee consisting of three persons, all to be approved by the court, who shall be designated, one by the bondholders committee, one by the Reconstruction Finance Corporation, and one by the Railroad Credit Corporation and the A. C. James Company jointly.”

In conformity with said Article R, Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson have been duly designated for membership on said reorganization committee, said Frederick H. Ecker having been designated by Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Committee representing a Group of Institutional Holders of the First Mortgage Bonds of the Debtor, said Frank C. Wright having been designated by Reconstruction Finance Corporation, and said Robert E. Coulson having been designated by The Railroad Credit Corporation and A. C. James Co. jointly. This Court is satisfied that said Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson should be approved as members of said reorganization committee.

Wherefore, It Is Ordered:

First: Said plan of reorganization heretofore approved by the order of this Court entered herein on August 15, 1940, is hereby confirmed.

Second: The designation of Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson as members of the reorganization committee provided for in Article R of said plan of reorganization is hereby approved. Said reorganization committee shall have the powers and authority provided for in said plan of reorganization and shall have full power and authority, under and subject to the supervision and control of this Court, to put into effect and carry out said plan of reorganization and the orders of this Court relative thereto, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. This Court hereby reserves

the power, subject to the provisions of Section 77 of the Bankruptcy Act, as amended, and said plan of reorganization, further to define, extend, amend, or otherwise change the powers and duties of said reorganization committee and to enter orders approving or disapproving any action on their part. As provided in Article R of said plan of reorganization, the members of said reorganization committee shall not be liable for any action taken by them in good faith or by any person employed by them in good faith, except for their respective individual malfeasance or willful neglect. To the extent necessary to give effect to the provisions of this paragraph, the members of said reorganization committee shall be indemnified and held harmless against any loss or expense, by the Trustees of the properties of the Debtor until the properties of the Debtor shall have been surrendered by said Trustees and thereafter by the Debtor or such other corporation as may acquire said properties pursuant to said plan of reorganization.

Third: Jurisdiction of these proceedings and of all parties in interest is hereby retained for the purpose of entering such other and further orders as this Court may determine to be necessary.

Fourth: As used in this order, the term "parties in interest" shall include the Debtor, all parties to these proceedings, all indenture trustees, and all creditors and stockholders of the Debtor.

Dated October 11, 1943.

/s/ A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Oct. 11, 1943.

[Title of District Court and Cause.]

Order Making an Allowance to be Paid Out of the Debtor's Estate for Certain Expenses Incurred and to be Incurred in Connection with the Proceedings and Plan of Reorganization by the Reorganization Committee

The petition filed on September 28, 1944, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorganization of the debtor above named, for an order making an allowance to be paid out of the debtor's estate for certain expenses incurred and to be incurred in connection with the proceedings and plan of reorganization by the Reorganization Committee, duly came on to be heard and was heard on the 16th day of October, 1944, and has been submitted.

The Court being fully advised in the premises, finds that due and proper notice of the hearing upon said petition in the form prescribed by the order of this Court dated and filed on the 29th day of September, 1944, has been admitted by all parties named in said order and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) That, pursuant to Section 77(c)(12) of the Bankruptcy Act, the Interstate Commerce Commission by its order dated September 7, 1944, has fixed the maximum limit for reasonable and necessary expenses of the Reorganization Committee, other than the fees and expenses of the attorneys for said Committee, in the amount of \$197,111.23, of which

the amount of \$60,638.48 constitutes the maximum limit fixed for the contingent tax liability described in said order and the amount of \$136,472.75 constitutes the maximum limit fixed for all other purposes, without limitation as to individual amounts with respect to component items, as described in said order;

(b) That for the purpose of enabling the Reorganization Committee to perform its proper functions in an orderly and expeditious manner, the procedure for auditing and payment of bills or statements of expenditures, and for the advancement of funds to said Committee, which is set forth in paragraphs 4 and 5 of the petition upon which this order is made, is appropriate and advisable and should be approved.

(c) That certain expenses heretofore incurred by the Reorganization Committee, in the aggregate amount of \$3,144.00, the detail of which was submitted to the Court upon the hearing, were properly incurred and are within the scope of the order of the Interstate Commerce Commission, dated September 7, 1944.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred and to be incurred by the Reorganization Committee under the plan of reorganization of The Western Pacific Railroad Company, exclusive of fees and expenses of said Committee's counsel, is hereby made in the aggregate amount of \$197,111.23, or so much thereof as may be required in carrying out the plan, of which the amount of \$60,638.48, or so

much thereof as may be required, is allowed for the contingent tax liability described in the order of the Interstate Commerce Commission of September 7, 1944, and the amount of \$136,472.75, is allowed for all other expenses without limitation as to individual amounts with respect to component items, as described in said order;

2. That the Trustees of the debtor's estate be and hereby are directed to reimburse the Reorganization Committee and its officers and members out of the debtor's estate for certain expenditures heretofore incurred by them, in the aggregate amount of \$3,144.00, the detail of which was submitted to the Court upon the hearing.

3. That further payments of the actual and reasonable expenses of the Reorganization Committee (whether incurred before or after the date of this order) be made out of the debtor's estate by the Trustees thereof, so long as said Trustees are in control of the same, and thereafter by the reorganized company, by the following procedure:

(a) The Reorganization Committee shall approve bills or statements of expenditures by voucher or covering letter, as may be convenient, signed by the Chairman or Secretary of the Committee, and shall submit the same to the Treasurer for the Trustees of the debtor or of the reorganized company, as the case may be;

(b) The Auditor for the Trustees of the debtor or of the reorganized company, as the case may be, shall examine all such bills or statements and, if

satisfied they are in order and that the items covered thereby are within the scope of the order of the Interstate Commerce Commission, dated September 7, 1944, shall approve them for payment, subject to the maximum limit of \$136,472.75 contained in said order of said Commission, and said Treasurer shall then make payment of the same upon such approval by said Auditor;

(c) Said Auditor shall keep a separate and detailed account of all such bills and statements so honored and shall make reports thereof to the Court within a reasonable time after the close of each month in which any such bills or statements are honored;

4. That funds for the payment of actual and reasonable expenses of the Reorganiaztion Committee may be advanced to it, from time to time, out of the debtor's estate or by the reorganized company, as aforesaid, upon written request to said Treasurer, setting forth the purpose of such advances and signed by the Chairman or Secretary of said Committee. Said request shall be audited and reported to the Court by said Auditor under the procedure set forth in paragraph (3) of this order. Said Committee shall account to said Auditor, from time to time, for all advances and shall file with him all receipts or other evidences of expenditures paid from such advances, and shall return any unexpended portion thereof to said Treasurer.

5. All such further payments and advances to the Reorganization Committee under the provisions of this order shall be subject to final approval and al-

lowance by this Court, at such time or times and upon such showing as the Court may direct.

Dated October 23, 1944.

/s/ A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Oct. 23, 1944.

In the District Court of the United States for
the Northern District of California,
Southern Division

No. 26591-S

In the Matter of The Western Pacific Railroad
Company, Debtor.

Order Directing the Revesting of Properties of the
Debtor in the Debtor Company, Fixing the Date
for Consummation of the Plan and Authorizing
and Directing the Carrying Out of the Plan.

The petition filed November 8, 1944, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorganization of the debtor above named, for an order directing the revesting of properties of the debtor in the debtor company, fixing the date for consummation of the plan, approving forms of deeds and agreements and authorizing and directing the carrying out of the plan of reorganization, came on duly to be heard on November 27, 1944, and was heard and has been submitted.

The Court being fully advised in the premises, finds that notice of the hearing upon said petition

has been given as prescribed by the order of this Court dated and filed November 8, 1944, and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) Pursuant to the order of this Court entered September 25, 1944, approving the proposed Certificate of Amendment to the Articles of Incorporation and proposed amended By-Laws for the debtor company, the stockholders and Board of Directors of The Western Pacific Railroad Company have approved and adopted said Certificate of Amendment and said amended By-Laws and have authorized the necessary filing of said Certificate of Amendment; and upon such filing of said Certificate of Amendment, The Western Pacific Railroad Company will be a proper corporate instrumentality for putting into effect and carrying out the plan of reorganization;

(b) The stockholders of The Western Pacific Railroad Company have consented in writing to the execution and delivery of the Indenture relating to the First Mortgage Bonds and the creation by The Western Pacific Railroad Company of the bonded indebtedness as provided therein, and have consented in writing to the execution and delivery of the Indenture relating to the General Mortgage Income Bonds and the creation by The Western Pacific Railroad Company of the bonded indebtedness as provided therein and have authorized the assumption by said Railroad Company of certain obligations of the debtor company and its estate as contemplated by the plan of reorganization and

have authorized the Board of Directors to issue shares of preferred and common stock, subject to the provisions of said Articles of Incorporation as so amended, and have authorized and directed the Board of Directors to do all other acts and things that may be necessary or appropriate in carrying out and making effective said plan of reorganization;

(c) The Board of Directors of The Western Pacific Railroad Company has approved the form of Indenture relating to the First Mortgage Bonds contemplated by the plan, the form of Indenture relating to the General Mortgage Income Bonds contemplated by the plan, the form of Scrip Agreement relating to the issuance of scrip in respect of fractional General Mortgage 4½% Income Bonds, Series A, shares of Preferred Stock, Series A, and shares of common stock; has approved the bond, scrip and other forms included in said Indentures and Scrip Agreement, and the forms of certificates for shares of Preferred Stock, Series A, and shares of common stock, and determined the manner of executing the same; has approved mortgaging and pledging the properties and franchises of said Railroad Company, as contemplated in the Indentures mentioned above; has authorized and directed the execution and acknowledgment, and delivery, on or before the date fixed by the Court for the consummation of the plan of reorganization, of said Indentures and the necessary filing and recording thereof, the issue on said date of \$10,000,000 aggregate principal amount of First Mortgage 4% Bonds, Series A, \$21,219,000 aggregate principal amount of

General Mortgage 4½% Income Bonds, Series A, 318,502 shares of the authorized Preferred Stock, Series A, not more than 319,032.767 shares of the common stock and the required scrip certificates, and the assumption of obligations by said Railroad Company, all as contemplated by said plan of reorganization and authorized and directed by the orders of the Court herein;

(d) The proposed deed from the debtor's Trustees to The Western Pacific Railroad Company, the proposed deed of release and satisfaction of mortgage from Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the debtor's First Mortgage dated June 26, 1916, and the proposed deed of release and satisfaction of mortgage from Irving Trust Company, as Trustee under the debtor's General and Refunding Mortgage, executed February 29, 1932, as of January 1, 1932 (annexed to this order as Exhibits "A," "B" and "C," respectively), are in proper form and sufficient when properly executed, acknowledged and delivered, to release, transfer to and revest in said Railroad Company all right, title and interest of the debtor's Trustees and of said Trustees under the debtor's said mortgages, in and to all of the business, assets and property dealt with by the plan of reorganization, free from any title or lien of the debtor's Trustees and said mortgages, are consistent with and conform to the provisions of the plan of reorganization, are necessary and appropriate to the putting into effect and carrying out the plan, and should be approved;

(e) The proposed agreement, attached to this order as "Exhibit D," provides for the assumption of obligations, liabilities, contracts, agreements and leases which are to be assumed by the reorganized company, pursuant to the plan of reorganization, is consistent with and conforms to the plan of reorganization, and should be approved;

(f) The Interstate Commerce Commission, by its order dated October 24, 1944, in Finance Docket No. 10913, has authorized the revesting in The Western Pacific Railroad Company of the business, assets and property constituting the estate of the debtor and the issue of securities and the assumption of obligations by The Western Pacific Railroad Company to the extent contemplated by the plan of reorganization and by this order; said order of the Commission also approves and authorizes the adjustment or compromise of the claims of the Reconstruction Finance Corporation against the debtor and its estate, pursuant to the applicable provisions of the Reconstruction Finance Corporation Act and said plan; said order of the Commission authorizes the issue of said securities as subject to Section 77(f) of the Bankruptcy Act, Section 20a of the Interstate Commerce Act and the applicable provisions of the Reconstruction Finance Corporation Act; said securities and the issue thereof are specifically exempt from the provisions of the Securities Act of 1933, under the terms of Section 3(a)(6) of said act and subsection (f) of Section 77 of the Bankruptcy Act and are specifically exempt from the provisions of the Trust Indenture Act of 1939,

under the terms of Section 304(a)(4) of said act, and said action by the Commission satisfies the statutory requirements for such issue and no other or further authorization of any other governmental commission, agency or body, federal or state, is necessary or required;

(g) The issuance, transfer and exchange of the securities and the making, delivery and filing of the instruments of transfer or conveyance issued, transferred, exchanged, made, delivered or filed, pursuant to the plan of reorganization, the order of the Commission referred to in subparagraph (f) above, or this order, are to make effective a plan of reorganization confirmed under the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended.

Now, Therefore, it is hereby ordered, adjudged and decreed:

1. The form and provisions of each of the following instruments are hereby approved:

(a) the deed from the debtor's Trustees to The Western Pacific Railroad Company, attached to this order as "Exhibit A";

(b) the deed of release and satisfaction of mortgage from Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the debtor's First Mortgage, to The Western Pacific Railroad Company, attached to this order as "Exhibit B";

(c) the deed of release and satisfaction of mortgage from Irving Trust Company, as Trustee un-

der the debtor's General and Refunding Mortgage, to The Western Pacific Railroad Company, attached to this order as "Exhibit C."

2. The arrangements made by the Reorganization Committee with Guaranty Trust Company of New York for the services of said Company as depositary and exchange agent and the proposed letter of instructions to said Company relating to the deposit and exchange of securities (submitted at the hearing upon said petition and attached to this order as Exhibit "F"), are approved.

3. The Western Pacific Railroad Company is hereby authorized and directed to file or cause to be filed, on or before December 28, 1944, the Certificate of Amendment to its Articles of Incorporation, heretofore approved by order of this Court entered September 25, 1944, with the Secretary of State of California and, in due course, to file copies thereof, as may be required by law, with the Secretaries of State of Nevada and Utah and in the several counties of the States of California, Nevada and Utah in which the railroad and properties of the debtor are located.

4. T. M. Schumacher and Sidney M. Ehrman, Trustees herein, are hereby authorized and directed to execute, acknowledge and deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed, substantially in the form attached to this order as "Exhibit A" and approved herein, releasing and transferring to The Western Pacific Railroad Company, as of 12:01 A.M., Pacific War

Time, on December 29, 1944, title to all property, rights and interests of every kind and description held by them as such Trustees, and are further authorized and directed thereafter to execute, acknowledge and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper to release, convey, assign or transfer to said Railroad Company, their entire right, title and interest in and to all of the business, assets and property of said Railroad Company.

5. Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the First Mortgage dated June 26, 1916, executed by the debtor to First Federal Trust Company and Henry E. Cooper, Trustees (Crocker First National Bank of San Francisco and Samuel Armstrong, successor Trustees), are hereby authorized and directed to execute, acknowledge and deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed releasing and satisfying, as of 12:01 A.M., Pacific War Time, on December 29, 1944, said First Mortgage of the debtor and all instruments supplemental or amendatory thereto, substantially in the form attached to this order as "Exhibit B" and approved herein, to transfer, convey and deliver to said Railroad Company, all moneys, credits, securities, evidences of indebtedness, choses in action, shares of stock, and all other property, rights and interest of every kind and description held by them as Trustees under said Mortgage and instruments

supplemental or amendatory thereto, and to execute and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper for these purposes.

6. Irving Trust Company of New York, as Trustee under the debtor's General and Refunding Mortgage executed February 29, 1932, as of January 1, 1932, by the debtor to The Chase National Bank of the City of New York, Trustee (Irving Trust Company, successor Trustee), is hereby authorized and directed to execute, acknowledge and deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed releasing and satisfying, as of 12:01 A.M., Pacific War Time, on December 29, 1944, said General and Refunding Mortgage of the debtor and all instruments supplemental or amendatory thereto, substantially in the form attached to this order as "Exhibit C" and approved herein, to transfer, convey and deliver to said Railroad Company all moneys, credits, securities, evidences of indebtedness, choses in action, shares of stock, and all other property, rights and interests of every kind and description held by it as Trustee under said Mortgage and instruments supplemental or amendatory thereto, and to execute and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper for these purposes.

7. Whether executed before or after the date of consummation of the plan of reorganization, each of the deeds of release and satisfaction made pur-

suant to paragraphs "5" and "6" of this order by the trustees of the mortgages mentioned in said paragraphs, shall be effective as of the date of consummation of said plan and as of that date, each of said trustees shall be discharged and relieved of all obligations, liabilities, responsibilities and duties with respect to the particular mortgage or deed of trust and all indentures supplemental thereto, under which such trustee is acting.

8. The Western Pacific Railroad Company and its proper officers are hereby authorized and directed to execute and deliver each and every of the following agreements and indentures, on or before December 28, 1944, as requested by the Reorganization Committee:

(a) agreement providing for the assumption of certain obligations, liabilities, contracts, agreements and leases of the debtor and the debtor's Trustees, substantially in the form attached to this order as "Exhibit D," the form and provisions of which are hereby approved;

(b) the Indenture relating to the First Mortgage Bonds, referred to in said petition, in the form submitted to this Court upon the hearing on said petition, which Indenture is found to be substantially in the form approved by order of this Court entered September 25, 1944; said Indenture to be deemed effective at 12:01 A.M., Pacific War Time, on December 29, 1944, coincident with the effective date of the deed from debtor's Trustees and the releases from existing mortgage trustees as provided in paragraphs "4," "5" and "6" of this order;

(c) the Indenture relating to the General Mortgage Income Bonds, referred to in said petition, in the form submitted to this Court upon the hearing on said petition, which Indenture is found to be substantially in the form approved by order of this Court entered September 25, 1944; said Indenture to be deemed effective at 12:01 A.M., Pacific War Time, on December 29, 1944, coincident with the effective date of the deed from debtor's Trustees and the releases from existing mortgage trustees as provided in paragraphs "4," "5" and "6" of this order, but immediately following and subject to the taking effect of the Indenture referred to in subdivision (b) of this paragraph 8;

(d) The Scrip Agreement referred to in said petition, substantially in the form submitted to this Court upon the hearing on said petition, which Agreement is found to be substantially in the form approved by order of this Court entered October 23, 1944;

(e) the salary agreement substantially in the form attached to this order as "Exhibit E," the form and provisions of which are hereby approved.

9. The Western Pacific Railroad Company shall assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by the debtor's Trustees and remaining in effect on the date of the actual delivery of possession by said Trustees and the actual termination of the responsibility of the debtor's Trustees for the operation of the debtor's properties, as hereinafter provided in this order, and which have

heretofore been assumed or not disaffirmed by said Trustees, which remain in effect on December 31, 1944, together with the expenses of this reorganization as allowed by the Court within the maximum fixed by the Interstate Commerce Commission. Without limitation of the generality of the duties imposed on The Western Pacific Railroad Company as above provided, it shall specifically assume and agree to perform the obligations of the Trustees in respect of the following

(a) \$1,235,000 unpaid balance, principal amount of Three Per Cent. Equipment Trust Certificates, Series of 1937, issued February 1, 1937, under Agreement of same date, between J. T. Harrigan and F. E. Egly, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(b) \$1,855,000 unpaid balance, principal amount of One and Three Quarters Per Cent Equipment Trust Certificates, Series of 1941, issued August 1, 1941, under Agreement of same date, between M. J. Suydam and F. W. Walter, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(c) Conditional Sale Agreement, dated as of May 25, 1943, between Lima Locomotive Works, Incorporated, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western

Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six steam freight locomotives.

(d) Conditional Sale Agreement, dated as of June 21, 1943, between Electro-Motive Division, General Motors Corporation and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of three 5400 H.P. diesel electric freight locomotives.

(e) Conditional Sale Agreement, dated as of June 1, 1944, between The Chase National Bank of the City of New York and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six 5400 H.P. diesel electric freight locomotives.

And, further, without limitation of the generality of the obligations hereinabove imposed upon The Western Pacific Railroad Company, that company shall (a) specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933, and had not therefore been presented for payment, being the coupons which this Court by orders of March 11, 1936, and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor, and (b) assume liability for, and pay in due course, any and all taxes lawfully due to the United States

from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in said proceeding and without prejudice by reason of such proof not having been made. The above ordered assumption and adoption shall be evidenced by the execution by said Railroad Company of the agreement of assumption referred to in paragraph "8(a)" above and of such other instruments of assumption as may be appropriate; and said Railroad Company shall succeed to all rights, privileges, liabilities and duties of the debtor or the debtor's Trustees under such contracts, leases and agreements; provided, however, that this order shall not be construed as a modification of any former orders of this Court barring or settling claims against the debtor or the debtor's Trustees, and said Railroad Company shall assume only the valid and outstanding obligations and liabilities of the debtor or the debtor's Trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged, and only such obligations and liabilities as are preserved under the plan of reorganization and are not limited or discharged by the prior orders of this Court.

10. The Western Pacific Railroad Company shall pay, in such amounts as have heretofore been, or shall hereafter be determined by this Court, but only to the extent that the same shall not have been paid by the debtor's Trustees, all expenses and costs of administration of this proceeding, including, with-

out limiting the generality of the foregoing, all allowances of compensation for services heretofore or hereafter rendered and reimbursed of expenses heretofore or hereafter incurred in connection with this reorganization proceeding or the plan of reorganization, subsequent to October 31, 1939; provided, however, that said Railroad Company is authorized to pay, in its discretion, without further order of this Court and regardless of amount, all rentals, costs and expenses growing out of the joint use of the property of other carriers, and all taxes, and all other obligations (not including any such allowances of compensation for services or reimbursement of expenses) incurred subsequent to August 2, 1935, by the debtor or the debtor's Trustees in the ordinary course of business in the operation of the aforesaid business, assets or property, pursuant to the general authorizations granted by this Court.

11. The date for the consummation of the plan of reorganization, and the date upon which the first mortgage bondholders and secured creditors of the debtor shall be entitled to receive in exchange for their old securities, the new securities and adjustment payments under the plan, as heretofore approved and authorized by this Court, is hereby fixed as December 29, 1944; all of the business, assets and property constituting the debtor's estate, of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees herein, shall vest in and be and become the absolute property of The Western Pacific Railroad Company

on said date, free and clear of all rights, claims, liens and interests of said Trustees, the former stockholders and creditors of the debtor, and of all other persons, firms and corporations whatsoever, except as is otherwise provided in this order, and the said Railroad Company shall thereupon be forever released and discharged from all of its debts, obligations and liabilities, except as herein provided; and The Western Pacific Railroad Company shall, on said date

(a) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to holders of the debtor's existing first mortgage bonds, or upon their order, upon presentation and surrender of such bonds, together with all interest coupons due after September 1, 1933 (upon which surrender said first mortgage bonds and interest coupons shall be cancelled), said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including the authorized scrip for fractional interests), and the adjustment payments heretofore ordered by this Court (for each \$1,000 principal amount of existing first mortgage bonds so surrendered, \$400 principal amount of General Mortgage 4½% Income Bonds, Series A; \$600 face amount of Preferred Stock, Series A, 4.67 shares of common stock, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944);

(b) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, to holders of scrip certificates for the debtor's existing first mortgage bonds in the aggregate principal amount of \$300, or upon their order, upon surrender of said certificates in lots of \$100 principal amount or any multiple thereof, said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court upon the same basis as such securities are issuable to holders of the debtor's existing first mortgage bonds, as provided in subparagraph (a), of this paragraph 11.

(c) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, to the holder or holders of ten of the debtor's existing first mortgage bonds, namely, Nos. M3595, M3596, M21612, M21613, M21614, M21615, M21616, M21618, M21619 and M21620, or upon their order, upon presentation and surrender of such bonds with coupons maturing on and after September 1, 1935, attached, notwithstanding the provisions of subparagraph (a), of this paragraph 11, only said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court, as follows: for each said bond, \$400 principal amount of General Mortgage 4½% Income Bonds,

Series A, \$600 par value of Preferred Stock, Series A, 3,356 shares of common stock and the adjustment payments as provided in the order of this Court dated September 25, 1944; and execute, issue and deliver or cause to be made available for delivery through said depository and exchange agent to The Western Pacific Railroad Corporation, or upon its order, in respect of coupons numbered 36 and 37 formerly attached to each of said bonds, upon presentation and surrender of such coupons, said Railroad Company's common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court, as follows: for each said coupon, .437 shares of common stock and the adjustment payment as provided in the order of this Court dated September 25, 1944.

(d) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to Reconstruction Finance Corporation, \$10,000,000 principal amount of said Railroad Company's First Mortgage 4% Bonds, Series A, bearing interest from January 1, 1945, \$1,185,200 principal amount of its General Mortgage 4½% Income Bonds, Series A, \$1,777,800 par value of its Preferred Stock, Series A, 15,788 shares of its common stock, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944; and Reconstruction Finance Corporation shall, on such date, surrender and pay over to

said Railroad Company, all outstanding Trustees' certificates of indebtedness heretofore at any time issued by the debtor's Trustees to Reconstruction Finance Corporation, \$6,000,000 of cash collateral heretofore deposited with Reconstruction Finance Corporation by the debtor's Trustees as security for said Trustees' certificates, all notes and other evidences of indebtedness of the debtor held by Reconstruction Finance Corporation, all bonds and other obligations of the debtor held by Reconstruction Finance Corporation as collateral security for said indebtedness, and all other collateral pledged by the debtor as security for the notes held by Reconstruction Finance Corporation; and Reconstruction Finance Corporation shall, on such date, pay over to said Railroad Company the further sum of \$1,075,000 in cash, less such sum as may be required for the payment of interest upon said Trustees' certificates to December 29, 1944, and the payment of an amount equal to interest on said \$10,000,000 of First Mortgage 4% Bonds from said date to January 1, 1945;

(e) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to The Railroad Credit Corporation, or upon its order, \$154,080 principal amount of said Railroad Company's General Mortgage 4½% Income Bonds, Series A, \$241,640 par value of its Preferred Stock, Series A, not more than 35,425 shares of common stock (including the authorized Scrip for fractional

interests) and \$72.00 in cash, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944, upon surrender by The Railroad Credit Corporation of all notes and other evidences of indebtedness of the debtor held by The Railroad Credit Corporation and of all bonds and other obligations of the debtor held by The Railroad Credit Corporation as collateral security for said indebtedness and all other collateral pledged by the debtor as security for the notes held by The Railroad Credit Corporation (other than the pledge of the distributive shares of the Railroad Company and its subsidiaries under the marshalling and distributing plan of 1931); provided, however, that of the maximum amount of common stock so authorized to be issued to The Railroad Credit Corporation, only so much shall be issued as is within the limitation fixed by the order of this Court made September 14, 1944, providing for the reduction of such common stock on account of sums applied by The Railroad Credit Corporation under the marshalling and distributing plan in reduction of its claims, but in the event that said order of September 14, 1944, shall be modified or reversed upon appeal so as to entitle The Railroad Credit Corporation to receive additional common stock within the maximum limit hereinabove stated, then The Western Pacific Railroad Company shall execute, issue and deliver such additional common stock without further order of this Court and without further consideration other than the surrender by The Railroad Credit Corporation at the time of

the consummation of the plan of its secured notes of the debtor and the collateral thereto to the extent and in the manner hereinabove provided;

(f) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to A. C. James Co., or upon its order, \$163,680 principal amount of said Railroad Company's General Mortgage 4½% Income Bonds, Series A, (including the authorized Scrip for fractional interests) \$256,700 par value of its Preferred Stock, Series A, 37,635 shares of its common stock and \$100.00 in cash, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944, upon surrender of all notes and other evidences of indebtedness of the debtor to A. C. James Co., all bonds and other obligations of the debtor held as collateral security for said indebtedness, and all other collateral pledged by the debtor as security for the notes to A. C. James Co.

12. Notwithstanding the provisions of the foregoing paragraphs "4" and "11" of this order, the debtor's Trustees are authorized and directed to continue their control and operation of the debtor's business and properties until 12:00 o'clock midnight, Pacific War Time, on December 31, 1944, and until such time, to retain possession of so much of the funds and properties of the debtor as may be necessary for the purposes of such control and operation; provided, however, that all right and duty of such

Trustees to possess, control or operate said business and properties shall cease at 12:00 o'clock midnight, on December 31, 1944.

13. Any lien which may attach to the property subjected to the lien of the mortgages to be executed and delivered by The Western Pacific Railroad Company pursuant to subparagraphs (b) and (c) of Paragraph 8 of this order, during the period between the execution and delivery thereof and the completion of the recording of said mortgages, shall be subordinate to the lien of such mortgages, unless any such lien so attaching would be prior to the lien of such mortgages if the same had been recorded; and this Court reserves jurisdiction over the business, assets, franchises and property to be vested in The Western Pacific Railroad Company as provided herein, and of any claims to liens which may be asserted against the same, to the extent necessary to give effect to the provisions of this paragraph.

14. Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, as the Reorganization Committee, are hereby authorized and directed to prepare a notice to the holders of first mortgage bonds and secured notes of the debtor, in such form as the Reorganization Committee shall determine, notifying such creditors that they are entitled to present the obligations of the debtor now held by them to the Guaranty Trust Company of New York, the depositary and exchange agent designated by the Court, and to receive, on and after December 29, 1944, for such obligations, the new securities and

adjustment payments to which they are entitled under the plan; said Reorganization Committee shall publish said notice twice a week for two successive weeks prior to December 29, 1944, in one daily newspaper of general circulation in the City of San Francisco, California, and in one daily newspaper of general circulation in the City of New York, New York. Said Reorganization Committee shall also mail a copy of said notice at least ten days prior to December 29, 1944, to each of the first mortgage bondholders and secured creditors of the debtor so far as the post office addresses of such security holders are available to the Reorganization Committee.

15. Until the further order of this Court, and except as the creation of liens is specifically provided for or permitted by this Court, all persons, firms or corporations, whatsoever or wheresoever situated, located or domiciled, are hereby restrained or enjoined from interfering with, attaching, garnishing, levying upon, granting or enforcing liens against or upon, or in any manner whatsoever disturbing any part of the assets, goods, moneys, railroad, properties and premises belonging to or in the possession of said Railroad Company on and after the time specified in paragraph "11" hereof, by reason of or growing out of any obligation or obligations heretofore incurred by the debtor or the debtor's Trustees herein.

16. The Reorganization Committee and The Western Pacific Railroad Company shall have full power and authority to and shall put into effect

and carry out the reorganization plan and the orders of this Court, including this order, relative thereto, the laws of any state or the decision or order of any state authority to the contrary notwithstanding.

17. For the purpose of the determination and application of the available net income of the reorganized company for the calendar year 1944, pursuant to subdivision "L" of the plan of reorganization, and for the determination of amounts payable as interest on the General Mortgage 4½% Income Bonds, Series A, of the reorganized company out of available net income for the calendar year 1944, and for the determination of earnings for the calendar year 1944, available for determination and payment by the directors of dividends upon the preferred and common stocks of the reorganized company, the operation by the debtor's Trustees of the properties and estate of the debtor during the calendar year 1944, shall be deemed to be for the account of the reorganized company; and the directors of the reorganized company are expressly authorized and directed to proceed with the determination of the available net income for the calendar year 1944, and the application of such available net income in the same manner as if such operation had actually been carried on in the calendar year 1944 by the reorganized company.

18. T. M. Schumacher and Sidney M. Ehrman, Trustees herein, shall render their final account to this Court on or before May 1, 1945, and The Western Pacific Railroad Company shall pay from time

to time their compensation and expenses, including compensation and disbursements of counsel acting for said trustees, as heretofore fixed by order of this Court until such date.

19. This order and all transactions pursuant hereto shall be without prejudice to any rights or claims of right of Reconstruction Finance Corporation and The Railroad Credit Corporation in and to any collateral pledged by persons other than the debtor as security for the notes of the debtor held by Reconstruction Finance Corporation and The Railroad Credit Corporation respectively, and without prejudice to any right or claim of right of The Railroad Credit Corporation under the terms of the plan of reorganization to retain distribution credits under the marshalling and refunding plan accruing to the debtor and its subsidiaries subsequent to the consummation of the plan of reorganization.

20. This Court reserves jurisdiction for all purposes necessary to put into effect and carry out this order and the plan of reorganization, including, without limiting the generality of this reservation, the right to enter, upon such notice as this Court may direct, any further order or orders terminating the right to receive any securities or payments of cash under the plan of reorganization; and this Court expressly reserves jurisdiction to determine all costs and expenses of administration, including the amounts to be paid as compensation for services heretofore or hereafter rendered or reimbursement for expenses heretofore or hereafter incurred by the Reorganization Committee and its attorneys,

or by any other person, firm or corporation, in connection with this proceeding and the plan of reorganization, and generally in connection with putting into effect and carrying out the plan of reorganization.

Dated: Nov. 27, 1944.

/s/ A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Nov. 27, 1944.

EXHIBIT "D"

Whereas, heretofore in a proceeding in the United States District Court for the Northern District of California, Southern Division, for the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, entitled "In the Matter of The Western Pacific Railroad Company, Debtor," No. 26591-S, a Plan of Reorganization of The Western Pacific Railroad Company was approved and confirmed, and, pursuant to the provisions of said Plan of Reorganization, an order was entered on September 25, 1944, by said Court approving the use of the said debtor company, The Western Pacific Railroad Company, a corporation organized and existing under the laws of the State of California, as the reorganized company in carrying out said plan;

Whereas, the Interstate Commerce Commission, under date of October 24, 1944, in Docket No. 10913, made a report and order which, among other things, approved and authorized the assumption by said

The Western Pacific Railroad Company of obligations and liabilities as provided in said plan;

Whereas, pursuant to said Plan of Reorganization and to the order entered in said proceeding on, 1944, T. M. Schumacher and Sidney M. Ehrman, as Trustee of the property of said The Western Pacific Railroad Company, duly appointed in said proceeding (hereinafter called the "Trustees"), have, by deed dated December, 1944, remised, released, transferred, conveyed and quit-claimed to the undersigned, said The Western Pacific Railroad Company, all of the property, real, personal and mixed, of every kind and nature, vested in, held, possessed, used or controlled by said Trustees;

Now, Therefore, pursuant to the provisions of said order entered, 1944, and in consideration of the said release, transfer and conveyance by the Trustees, the undersigned The Western Pacific Railroad Company, for itself, its successors and assigns, makes this Agreement with said Trustees, for the benefit of said Trustees and of all other parties in interest in the above-entitled proceedings, under which agreement the undersigned does hereby:

1. Assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by said Trustees and remaining in effect on December 31, 1944, and all contracts, leases and agreements of the debtor in effect on August 2, 1935, either assumed or not disaffirmed by said Trustees, which remain in effect

on December 31, 1944, and expenses of reorganization allowed by the Court within the maximum fixed by the Interstate Commerce Commission;

2. Assume any and all outstanding current liabilities and obligations incurred by said Trustees and without limitation thereto, any and all liabilities or obligations of the debtor in possession or said Trustees with respect to claims for personal injury or death for loss or damage to property and generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustee, or their conduct of the debtor's business, including liabilities and obligations hereafter arising up to midnight December 31, 1944.

3. Without limitation of the generality of the foregoing agreements in paragraphs 1 and 2 hereof, specifically undertake to defend at its own sole cost and expense all suits and proceedings, of whatsoever character, now or hereafter instituted against the Trustees, or either of them, arising out of the possession, use or operation of the debtor's properties by the Trustees or of their conduct of the debtor's business, and to assume the conduct of all suits and proceedings, of whatsoever character, heretofore or hereafter brought by the Trustees in the discharge of their duties and responsibilities as such, and, generally, to indemnify the Trustees and save them harmless against all expense, liability, loss, judgments, claims and demands arising out of such suits or proceedings. It is the intent of the

covenants in this paragraph 3 contained that The Western Pacific Railroad Company shall assume responsibility for all such suits and proceedings to which the Trustees, or either of them, are or shall become parties, to the same effect as if The Western Pacific Railroad Company instead of the Trustees had been party thereto in the first instance.

4. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to perform the obligations of the Trustees in respect of the following:

(a) \$1,235,000 unpaid balance, principal amount of Three Per Cent. Equipment Trust Certificates, Series of 1937, issued February 1, 1937, under Agreement of same date, between J. T. Harrigan and F. E. Egly, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(b) \$1,855,000 unpaid balance, principal amount of One and Three Quarters Per Cent Equipment Trust Certificates, Series of 1941, issued August 1, 1941, under Agreement of the same date, between M. J. Suydam and F. W. Walter, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(c) Conditional Sale Agreement, dated as of May 25, 1943, between Lima Locomotive Works, Incorporated, and T. M. Schumacher and Sidney M.

Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six steam freight locomotives.

(d) Conditional Sale Agreement, dated as of June 21, 1943, between Electro-Motive Division, General Motors Corporation and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of three 5400 H.P. diesel electric freight locomotives.

(e) Conditional Sale Agreement, dated as of June 1, 1944, between The Chase National Bank of the City of New York and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six 5400 H.P. diesel electric freight locomotives.

5. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment; such coupons being those which the Court by orders of March 11, 1936, and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor:

6. Without limitation of the generality of the

foregoing agreements in Paragraphs 1 and 2 above, assume the liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in the said proceeding and without prejudice by reason of such proof not having been made.

This agreement shall become effective on December 29, 1944, at 12:01 A.M., Pacific War Time.

In Witness Whereof, the undersigned has caused this instrument to be executed in its behalf by its President and its corporate seal to be hereunto affixed this day of December, 1944.

THE WESTERN PACIFIC
RAILROAD COMPANY,

By
President

Attest:

.....

[Appropriate acknowledgment to be supplied.]

[Title of District Court and Cause.]

Order Approving and Confirming Ninth and Final Report and Accounting by the Trustees of the Property of the Debtor, Approving and Confirming Their Acts and Accounts, Discharging Them as Trustees and Exonerating Their Bonds

The Ninth and Final Report and Accounting by T. M. Schumacher and Sidney M. Ehrman, the

Trustees of the properties of the Debtor above named, and the petition of said Trustees for approval of their acts and accounts, for their discharge as Trustees and for the exoneration of their bonds, filed herein on April 30, 1945, came on regularly for hearing on May 21, 1945, and it appearing and the Court finding:

1. That said Trustees have given notice of hearing by mailing and publication as directed by the order of this Court made on April 30, 1945;

2. That the allegations of said Ninth and Final Report and Accounting and of said petition are true;

3. That as directed by the order of this Court made on November 27, 1944, and as requested by the Reorganization Committee, said Trustees executed, acknowledged and delivered to the Debtor Company, prior to December 28, 1944, a deed substantially in the form attached to said order as Exhibit "A", releasing and transferring to the Debtor Company as of 12:01 a.m., Pacific War Time, on December 29, 1944, title to all property, rights and interests of every kind and description held by them as such Trustees, thereupon and thereby divesting the Trustees of all title to all properties and assets held by them as Trustees in this proceeding and vesting such title to all thereof in the Debtor Company;

4. That in exchange for said deed, referred to in the immediately preceding paragraph hereof, said Trustees received from the Debtor Company an agreement, substantially in the form of Exhibit "D" attached to said order of November 27, 1944, whereby the Debtor Company assumed and agreed to perform

all contracts, leases, agreements, liabilities and obligations of the Trustees remaining in effect on December 31, 1944;

5. That as authorized and directed by said order of this Court made on November 27, 1944, said Trustees continued their control and operation of the Debtor's business and properties until 12:00 o'clock midnight, Pacific War Time, on December 31, 1944, whereupon all possession, control and operation of said business and properties by the Trustees ceased and terminated, and possession, control and operation of all said business and properties were transferred to and accepted by the Debtor Company;

6. That at or prior to the end of the year 1944 and Trustees divested themselves of, and transferred and conveyed to and vested in the Debtor Company, all title to and all possession, control and operation of the business and properties theretofore held by the Trustees in this proceeding, all as required by orders of this Court; and

7. That all duties, obligations, services and responsibilities of said Trustees in this proceeding have been duly and fully performed and completed, save only the execution of any further instruments of conveyance, transfer, substitution or release which may be requested by the Debtor Company for the purpose of implementing or consummating the complete and effective transfer to the Debtor Company of all of the business, properties, assets, contracts, agreements, leases, actions, rights and claims heretofore held by said Trustees in this proceeding.

Now, Therefore, the Court being fully advised in

the premises, It Is Hereby Ordered, Adjudged and Decreed:

1. That said Ninth and Final Report and Accounting by said Trustees and all of their acts and accounts alleged and set forth in said Ninth and Final Report and Accounting be and the same are hereby approved and confirmed;

2. That said Trustees be, and they hereby are, discharged, reserving, however, to the Trustees, jointly and to each of them separately, and to the survivor of them, the power and authority hereafter to execute and deliver such instruments of conveyance, transfer, substitution or release as may be requested by the Debtor Company from time to time in order to implement, consummate, confirm or further evidence the complete and effective release, transfer and conveyance of the Debtor Company of all the business, properties, assets, contracts, agreements, leases, actions, rights and claims held by the Trustees in this proceeding; provided, however, that said Trustees shall have the right, but shall not be required, to submit any such instruments to this Court for approval prior to execution and delivery thereof, jurisdiction being hereby reserved by the Court for such purposes; and

3. That notwithstanding their discharge said Trustees be, and they hereby are, authorized, jointly and separately, at any time upon the request of the Debtor Company, to cooperate with the Debtor Company in any and every suit, litigation, proceeding, controversy or compromise in which their cooperation as such Trustees may appear necessary or desirable; and

4. That the bonds heretofore given by said Trustees severally for the faithful discharge of their duties and responsibilities be, and the same hereby are, exonerated, and said Trustees and Fidelity and Deposit Company of Maryland, the surety upon each of said bonds, be and they hereby are released from all liability on said bonds.

Dated May 21, 1945.

/s/ A. F. ST. SURE,
Judge.

[Endorsed]: Filed May 21, 1945.

[Title of District Court and Cause.]

FINAL ORDER

The petition filed March 18, 1946 by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the duly constituted Reorganization Committee designated to carry out the plan of reorganization of The Western Pacific Railroad Company above named, for an order approving their expenses, discharging the Committee and terminating the proceedings duly came on to be heard on March 28, 1946 and was heard and has been submitted.

The Court being fully advised in the premises finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court dated and filed March 18, 1946, and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) All of the business, assets and property constituting the debtor's estate of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees in Reorganization, vested in and became the absolute property of The Western Pacific Railroad Company on December 29, 1944, free and clear of all rights, claims, interests, liens and encumbrances of the former stockholders and creditors of the debtor company and all other persons, except as otherwise provided and directed in the order of this Court in this proceeding dated and entered November 27, 1944; and The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order.

(b) The plan of reorganization of The Western Pacific Railroad Company, which was duly confirmed by order of this Court dated and entered October 11, 1943, has been fully and properly carried out and put into effect in accordance with the terms and provisions of said plan and the orders of this Court heretofore entered in this proceeding; all acts and things required by the order of this Court dated and entered November 27, 1944, to be done or performed in order to consummate said plan, have been properly done or performed; the exchange of more than 99% of the principal amount of securities of

the reorganized company has been effected in accordance with the plan of reorganization and the orders of this Court; and adequate and proper arrangements have been made for the exchange of the remainder of said securities.

(c) The reasonable and necessary expenses of the Reorganization Committee in carrying out and putting into effect the plan of reorganization, as disclosed by Schedule "B" annexed to the petition for this order, filed by said Committee and supported by evidence introduced at the hearing upon said petition, exclusive of the fees and expenses of the attorneys for said Committee, which have heretofore been approved and allowed by order of this Court filed December 10, 1945, are within the maximum limits approved by the Interstate Commerce Commission and authorized by this Court by order filed October 23, 1944, and should be finally approved and allowed.

(d) Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, members of the duly constituted Reorganization Committee, have fulfilled their functions, faithfully performed their duties as members of the Reorganization Committee and now have no further duties and should be discharged.

(e) The plan of reorganization having been carried out and put into effect in accordance with the terms of the plan and the orders of this Court, a final decree should be entered in this cause, subject only to the reservations of the jurisdiction hereinafter made in this decree.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed:

1. That these proceedings be and they hereby are terminated subject only to the reservations of jurisdiction hereinafter made by the Court in this order, and the reservations of jurisdiction contained in the order of this Court discharging the Trustees of the Debtor's estate, dated and entered May 21, 1945.

2. That the expenses incurred by the Reorganization Committee in consummating, carrying out and putting into effect the plan of reorganization, as shown by the summary which is attached as Exhibit "B" to the petition for this order, filed by the Reorganization Committee, are hereby in all respects finally approved and allowed.

3. That the actions of the Reorganization Committee in putting into effect and carrying out the plan of reorganization and the orders and directions of this Court relative thereto, are hereby approved, ratified and confirmed.

4. That Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the members of the Reorganization Committee herein, be and each of them is hereby discharged and relieved from all further duties herein.

5. That the order of this Court dated and entered November 27, 1944, in this proceeding shall remain in full force and effect in so far as said order has not been fully carried out.

6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise,

against The Western Pacific Railroad Company, or against the successors or assigns of said Company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting

into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings.

7. The Western Pacific Railroad Company is hereby ordered and directed to reimburse, indemnify and hold harmless the members of the Reorganization Committee, or any of them, or any person employed by them, against any loss or expense arising out of or in connection with carrying out and putting into effect in good faith the plan of reorganization, including, without limitation of the generality of the foregoing, the contingent tax liability described in the order of the Interstate Commerce Commission of September 7, 1944 and allowed in the order of this Court entered October 23, 1944.

8. The Western Pacific Railroad Company is hereby directed to give notice of the entry of this final order by mailing, postage prepaid, a copy of this order to the Trustees of the debtor's estate, the Reorganization Committee, each party of record in the reorganization proceedings before this Court or the Interstate Commerce Commission (or the counsel for each such party), and to cause promptly to be published a notice of the entry of this final order, setting forth in said notice the complete text of this order as certified by the clerk of this Court, such publication to be made once in each of the following: A daily newspaper of general circulation in the City of San Francisco, California; a daily newspaper of general circulation in the City of New York, New York; and a daily newspaper of general circulation in the City of Chicago, Illinois. Proof of such service

and publication shall be filed by said Company with the Clerk of this Court within thirty days after the completion of the same.

9. The Court hereby reserves jurisdiction to take such further proceedings as may be proper or necessary to enforce and make effective any direction or other provision contained in the order of this Court, filed November 27, 1944 in this proceeding, to enforce and make effective the terms and provisions of this final decree and, if necessary, to give instructions to the Western Pacific Railroad Company, upon application by said Company, with respect to carrying out the provisions of said order filed November 27, 1944, and of this order; to take such further proceedings as may be proper or necessary in connection with any appeal or appeals prosecuted from any order of this Court, in this proceeding; and to take such further proceedings as may be necessary or proper in connection with any expenses or liabilities within the provisions of the order of this Court filed October 23, 1944, or otherwise, which may hereafter be asserted against the Reorganization Committee, its agents or attorneys, in connection with carrying out and putting into effect the plan of reorganization.

10. Except as hereby specifically provided in the reservations of jurisdiction set forth in Paragraph 9 above, and except as provided in the reservations of jurisdiction of the order of this Court filed May 21, 1945, discharging the Trustees of the debtor's estate, the reorganization proceedings in this Court, entitled in the Matter of the Western Pacific Rail-

road Company, Debtor, No. 26591-S, are hereby terminated and the case is closed.

Dated March 28, 1946.

/s/ A. F. ST. SURE,
District Judge.

Entered in Vol. 37 Judg. and Decrees at page 175.

[Endorsed]: Filed March 28, 1946.

[Title of District Court and Cause.]

PETITION OF THE WESTERN PACIFIC
RAILROAD COMPANY FOR AN ORDER
TO SHOW CAUSE

The petition of The Western Pacific Railroad Company, debtor (now discharged) in the above entitled proceeding, for an order to show cause why The Western Pacific Railroad Corporation should not be adjudged guilty of contempt of the Final Order of this Court dated March 28, 1946, respectfully shows:

That the said The Western Pacific Railroad Corporation, a corporation created by and existing under the laws of the State of Delaware, is a party to the above entitled reorganization proceeding.

That in said Final Order this Court expressly found and concluded, among other things, that:

“(a) All of the business, assets and property constituting the debtor’s estate of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and

Sidney M. Ehrman, as Trustees in Reorganization, vested in and became the absolute property of The Western Pacific Railroad Company on December 29, 1944, free and clear of all rights, claims, interests, liens and encumbrances of the former stockholders and creditors of the debtor company and all other persons, except as otherwise provided and directed in the order of this Court in this proceeding dated and entered November 27, 1944; and The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order."

That in said Final Order this Court ordered, adjudged and decreed, among other things, that:

"6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against The Western Pacific Railroad Company, or against the successors or assigns of said Company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets

or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings.

* * * *

“9. The Court hereby reserves jurisdiction to take such further proceedings as may be proper or necessary to enforce and make effective any direction or other provision contained in the order of this Court, filed November 27, 1944 in this proceeding, to enforce and make effective the terms and pro-

visions of this final decree and, if necessary, to give instructions to the Western Pacific Railroad Company, upon application by said Company, with respect to carrying out the provisions of said order filed November 27, 1944, and of this order; to take such further proceedings as may be proper or necessary in connection with any appeal or appeals prosecuted from any order of this Court, in this proceeding; and to take such further proceedings as may be necessary or proper in connection with any expenses or liabilities within the provisions of the order of this Court filed October 23, 1944, or otherwise, which may hereafter be asserted against the Reorganization Committee, its agents or attorneys, in connection with carrying out and putting into effect the plan of reorganization.”

That a copy of said Final Order was duly served within 30 days of its date on the said The Western Pacific Railroad Corporation.

That no appeal was taken from said Final Order, that the time for appeal therefrom has expired, and that the said Final Order has become final and is now in full force and effect.

That on the 24th day of August, 1946, the said The Western Pacific Railroad Corporation commenced in this Court an action numbered 26333-H and entitled: “The Western Pacific Railroad Corporation, Plaintiff, vs. Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants.”

That petitioner was served on the 27th day of August, 1946 with the summons and a copy of the bill of complaint filed in said action. That a copy of said bill of complaint, marked "Exhibit A", is attached hereto and is hereby incorporated herein.

That The Western Pacific Railroad Corporation has asserted in said action a claim against the petitioner which, if it exists at all, existed on and before December 28, 1944. That the commencement of said action is not and has not been provided for or permitted by any order of this Court. That the said action of The Western Pacific Railroad Corporation constitutes a violation of the Final Order of this Court dated March 28, 1946.

Wherefore, the petitioner asks that this Court issue forthwith its order to The Western Pacific Railroad Corporation directing it to show cause why it should not be adjudged guilty of and punished for contempt of the said Final Order of this Court, and for such other and further relief, including its costs and damages, as may be proper in the premises.

/s/ ALLAN P. MATTHEW,

/s/ ROBERT L. LIPMAN,

/s/ BURNHAM ENERSEN,

Attorneys for The Western Pacific Railroad Co.

Of Counsel:

McCutchen, Thomas, Matthew, Griffiths &
Greene.

(Duly Verified.)

[Endorsed]: Filed Aug. 30, 1946.

EXHIBIT "A"

In the District Court of the United States
for the Northern District of California,
Southern Division

The Western Pacific Railroad Corporation,
Plaintiff,

vs.

Sacramento Northern Railway, The Western Pacific
Railroad Company and American Trust Com-
pany of San Francisco, as Trustee under an In-
denture executed by Sacramento Northern
Railroad as of July 1, 1918,

Defendants.

BILL OF COMPLAINT

The Western Pacific Railroad Corporation, plain-
tiff herein, complaining of the above named defend-
ants, respectfully shows:

I.

That the plaintiff is a domestic corporation created
by and existing under the laws of the State of
Delaware.

II.

That each of the defendants is a domestic corpora-
tion created by and existing under the laws of the
State of California and is an inhabitant of the
Northern District of California.

III.

That this is a civil action in equity between citizens
of different States and that the amount in contro-

versy exclusive of interest and costs exceeds the sum of \$5,000.

IV.

That in the year 1928 the plaintiff advanced to the defendant, Sacramento Northern Railway, sums of money aggregating \$877,380, of which \$21,120 was repaid January 31, 1929, leaving a balance due on said date of \$856,260, and in the period subsequent to said advances the defendant, Sacramento Northern Railway, has accrued interest thereon to a total of \$585,130.55, and said amounts aggregating \$1,441,-390.55 are shown as indebtedness due the plaintiff on the General Balance Sheets of the defendant, Sacramento Northern Railway, as of June 30, 1945. That for a number of years within a period of four years next preceding the institution of this suit the defendant, Sacramento Northern Railway, has furnished to the plaintiff duly authenticated Balance Sheets signed by properly authorized accounting officers showing such indebtedness for principal and appropriate amounts for accrued interest thereon as valid and subsisting indebtedness due and owing from said defendant to the plaintiff and has authorized the plaintiff to file each such Balance Sheet on its behalf with Commissioner of Internal Revenue as the basis for the determination of federal taxes.

V.

That the aforesaid indebtedness due to the plaintiff by the defendant, Sacramento Northern Railway, in the amount including interest of \$1,441,-390.55 was created and arose in the manner herein-after stated and is entitled in equity to a first and paramount lien on the railways, property and assets

of said defendant, Sacramento Northern Railway, and such indebtedness is entitled to be paid in full prior to any payment of or on account of indebtedness, if any, due and owing to the defendant, The Western Pacific Railroad Company, by the defendant, Sacramento Northern Railway.

VI.

That the defendant, The Western Pacific Railroad Company, now owns and operates, and at all times mentioned in this Bill of Complaint has owned and operated, a system of Railways in the States of California, Nevada and Utah, with termini at San Francisco, Oakland and Sacramento in the State of California, and Salt Lake City in the State of Utah. That during part of the period 1935 to 1945 its operations were conducted by Trustees appointed by this Court pursuant to provisions of The National Bankruptcy Act. That the properties of the defendant, The Western Pacific Railroad Company, were released to it by the said Trustees as of December 31, 1944 for corporate operation and such operation still continues. That prior to November 22, 1943, all of the capital stock of the defendant, The Western Pacific Railroad Company, was held by the plaintiff which had issued shares of its own stock thereagainst. That this arrangement was made for the reason that under certain provisions in the corporate law of California, since repealed, there was a problem of stockholders' liability. That subsequent to November 22, 1943, but prior to December 31, 1944, the capital stock of the defendant, The Western Pacific Railroad Company, theretofore owned by the

plaintiff, was delivered to the Reorganization Committee of the defendant, The Western Pacific Railroad Company, to facilitate its reorganization which was consummated as of said last mentioned date. That from time to time prior to November 22, 1943, the plaintiff served as banker for the defendant, The Western Pacific Railroad Company, and advanced to it and to its subsidiaries sums of money which they agreed to repay.

VII.

That in 1925, the defendant, The Western Pacific Railroad Company, acquired at a cost of approximately \$4,500,000 all of the capital stock and mortgage indebtedness of the Sacramento Northern Railway, one of the defendants herein, being 10,000 shares of common stock (\$100 par value) and \$5,224,373 mortgage bonds, which securities were purchased by the defendant, The Western Pacific Railroad Company, from the plaintiff and which securities the plaintiff at the request of said defendant, The Western Pacific Railroad Company, had acquired and held until such time as the defendant, The Western Pacific Railroad Company, could obtain from the Interstate Commerce Commission the necessary authority under the Interstate Commerce Act to control the defendant, Sacramento Northern Railway. That the interim ownership or control of said Sacramento Northern Railway by the plaintiff was an arrangement entered into at the request and for the convenience of the defendant, The Western Pacific Railroad Company, which desired to own and control said Sacramento Northern Railway for the purpose of securing access to valuable traffic

in interchange originating in the Sacramento Valley. That the defendant, Sacramento Northern Railway, then owned and has continued to own and operate an interurban electric railway engaged in transporting both passengers and freight located in the rich traffic producing territory of the Sacramento Valley extending from Sacramento to Chico, with branches to Oroville, Colusa, and Woodland, and a detached line running southwesterly from Vacaville. That authority has been granted to construct additional lines including a line approximately 16 miles in length extending southerly from a connection with the line of the San Francisco-Sacramento Railroad Company, hereinafter mentioned, at a point 7 or 8 miles south of Sacramento. That it is stated in the Report of the Interstate Commerce Commission authorizing the defendant, The Western Pacific Railroad Company, to acquire control of the defendant, Sacramento Northern Railway:

“As the Western Pacific will hold over 99% of the Railroad Company’s Bonds, which constitute its funded debt, the value of the properties to the Western Pacific from the standpoint of earnings will be measured by the Railroad Company’s gross income less miscellaneous deductions therefrom. Gross income so reduced has averaged \$292,780.43 for the period given and was \$168,335.63 in 1924. Besides the direct return which the record indicates the Western Pacific will receive as owner of the securities of the Railroad and the Railway Companies, it will also receive income because of additional traffic which will be delivered to it by the Railway Company and on which it will get its long haul to Salt Lake.”

That the plaintiff for further factual detail hereby refers to the official Report of the Interstate Commerce Commission from which the foregoing is quoted and which appears in 99 Interstate Commerce Commission Report at page 382 under title: "Finance Docket No. 1881—Proposed Control of Sacramento Northern By Western Pacific R. R." That the defendant, The Western Pacific Railroad Company, has duly reimbursed the plaintiff for all amounts provided by it prior to July 8, 1925 in the acquisition of control for its account of the defendant, Sacramento Northern Railway.

VIII.

That the acquisition by the defendant, The Western Pacific Railroad Company, of control of the defendant, Sacramento Northern Railway, had proved so advantageous and so profitable to the defendant, The Western Pacific Railroad Company, in the period July 8, 1925 to July 1, 1928, that it determined at or before said last mentioned date to broaden the enterprise and extend feeder lines further into the fertile areas of the Sacramento Valley by acquiring through its subsidiary the defendant, Sacramento Valley Railway, the lines of railway and other properties of the San Francisco-Sacramento Railroad Company, described in the Report of the Interstate Commerce Commission hereinafter mentioned as follows:

"(a) Extending from Oakland in a general easterly and northeasterly direction to Mallard, thence by barge and ferry across Suisun Bay, and continuing in a northeasterly direction to Sacramento; (b)

from West Pittsburg in an easterly direction to and through the city of Pittsburg; and (c) a line of railroad located on M Street in the city of Sacramento. The total mileage of main and branch line track to be acquired is 87.08 miles, in Alameda, Contra Costa, Solano, Yolo, and Sacramento Counties, Calif."

That again, as in the case of the acquisition of control of the defendant, Sacramento Northern Railway, the plaintiff was requested to advance the funds necessary to secure control in the interim in which application for control by the defendant, The Western Pacific Railroad Company, was pending in the Interstate Commerce Commission. That to this end advances were made by the plaintiff which ultimately became part of the purchase price of the properties of the San Francisco-Sacramento Railroad Company which were acquired at a total cost of \$1,675,000 as of January 1, 1929 by the defendant, Sacramento Northern Railway, pursuant to authorization of the Interstate Commerce Commission granted October 15, 1928. That the plaintiff for further factual details hereby refers to the official Report of the Interstate Commerce Commission relating to such authorization which appears in 145 Interstate Commerce Commission Report, at page 533, under title: "Finance Docket No. 7060—Acquisition by Sacramento Northern Railway of Properties of San Francisco-Sacramento Railroad Company." That except the payment of \$21,120 made January 31, 1929, for which credit has been given, neither the defendant, The Western Pacific Railroad Company, nor its subsidiary, the defendant, Sacramento Northern Railway, has re-

paid to the plaintiff any part of the principal sum advanced by it to the defendant, Sacramento Northern Railway, and has paid to the plaintiff no part of the interest thereon regularly credited to the plaintiff on the books of the defendant, Sacramento Northern Railway, and the whole amount thereof shown on the books of the defendant, Sacramento Northern Railway, in the amount of \$1,441,390 as of June 30, 1945, is due and owing to the plaintiff and for reasons hereinafter more fully stated is a first and paramount equitable lien and charge (a) upon the properties and assets of the defendant, Sacramento Northern Railway, and (b) upon the revenues derived by the defendant, The Western Pacific Railroad Company, from traffic originating on the lines or at the terminals of the defendant, Sacramento Northern Railway to the extent that the plaintiff's claim against such revenues is entitled to priority over the mortgages of the defendant, The Western Pacific Railroad Company which have been released under the Plan of Reorganization and Orders of this Court in the reorganization proceeding hereinbefore referred to. That the principal amount of said debt so due and owing to the plaintiff represents the unpaid balance of the purchase price of properties purchased by and now owned by the defendant, Sacramento Northern Railway, and through it by its proprietor, the defendant, The Western Pacific Railroad Company, and unless the plaintiff is accorded the preferences and priority and the equitable liens herein prayed the said defendants will be unduly enriched to that extent contrary to the cardinal principles of equity and the obligations of good conscience.

IX.

That the priority and preferential status of the plaintiff's claim as an equitable lien and charge upon the properties and revenues of the defendants, Sacramento Northern Railway and The Western Pacific Railroad Company, arise by operation of fundamental legal and equitable principles as applied to the facts hereinbefore alleged and hereinafter more fully developed and amplified:

It is a deep rooted principle of law of private property that one may deal with one's own as one will but shall not be suffered to do so in a manner that will adversely affect the property rights of others. This doctrine comes into play in corporate law as governing and limiting the right of a parent corporation to manage and deal with a wholly or partially owned subsidiary company. If the subsidiary is wholly owned and has no creditors whose interests might be affected adversely the power and authority of the parent over the subsidiary is absolute but if the ownership is not complete or if there are unpaid creditors of the subsidiary the power and authority of the parent is curtailed to the extent necessary to protect the outstanding interest. It is an accepted, broad, equitable principle that corporate autonomy will not be upheld to permit fraud or injustice. This principle is particularly applicable in dealing with controlled or wholly owned subsidiary corporations which are the instrumentalities of the controlling corporation. The philosophy of this rule sometimes referred to as the "Deep Rock Doctrine" is developed in the Opinion written by Mr. Justice Douglas for the Supreme Court in *Pepper v. Litton*,

308 U. S. 295, interpreting the earlier case of *Taylor v. Standard Gas & Electric Company*, 306 U. S. 307 and is elaborated in an Article by Professor Wormser in 12 *Columbia Law Review* entitled "Piercing the Veil of Corporate Entity". From the inception of the ownership and control by the defendant, The Western Pacific Railroad Company, of the defendant, Sacramento Northern Railway, it has exercised all the rights and privileges of complete proprietorship, and has utilized the lines and facilities of its subsidiary (as it was proper it should do and as it had formally advised the Interstate Commerce Commission it intended to do) to develop and secure long haul traffic for its own rails between the Sacramento Valley, in California, and Salt Lake City in the State of Utah. In the early years of its proprietorship the properties of the defendant, Sacramento Northern Railway, yielded a substantial return upon the capital invested therein. The property was self-sustaining and would have continued to be so if its earning power had not been curtailed by its merger in 1929 with the properties of the San Francisco-Sacramento Railroad Company which was purchased at a cost of \$1,675,000 at a time when it had ceased to be self-sustaining, was operating at a deficit and was threatened with proceedings in abandonment. The combination of these properties produced an enlarged enterprise which was a valuable adjunct to the defendant, The Western Pacific Railroad Company, but which never earned for itself and its creditors any return upon the capital invested therein. There was no effort on the part of the defendant, The Western Pacific Railroad Company, to so man-

age the combined properties as to develop a self-sustaining earning power and there was no reason for such effort so long as it recognized the prior and paramount equity of the plaintiff's claim for repayment with lawful interest of its advances to the defendant, Sacramento Northern Railway. In railway economics the defendant, Sacramento Northern Railway, was in a special category known as "an originating carrier." Such a carrier gathers and distributes traffic which moves only a short distance over its own rails and does not produce sufficient revenue for the short line haul to pay the cost of the service. To compensate it for its service and keep it in business it is given by connecting lines a higher percentage of the revenue than a division on a mileage basis which is known as an arbitrary. This varies in amount in relation to the facts of each case. One of the objectives of The Western Pacific Railroad Company in acquiring control of the defendant, Sacramento Northern Railway, in 1925 was to avoid such an arbitrary and permit it to retain, as it subsequently did, all of the revenue derived from its own long haul of traffic originating on the line of the Sacramento Northern Railway. For more than 15 years the defendant, The Western Pacific Railroad Company, has retained all of such revenues without being asked to account to Sacramento Northern Railway for any part thereof so as to provide it with funds for the repayment of the advances made to it by the plaintiff. In such an accounting the defendant, The Western Pacific Railroad Company, as the result of judicial and administrative decisions which stem back to the case of St. Louis &

San Francisco Ry. Co. v. Gill, 156 U. S. 649, 665, will not be permitted to apply its over-all operating ratio to the business interchanged with its subsidiary, the defendant, Sacramento Northern Railway, but will be accountable to it for all of the revenue derived from the full line haul except the out-of-pocket operating cost applicable thereto. The exact amount of such revenues is unknown and could only be determined as the result of an intricate accounting but the plaintiff alleges that the amount of such revenues approximates or exceeds \$20,000,000. In the period in which the defendant, The Western Pacific Railroad Company, retained these revenues on traffic delivered to it by the Sacramento Northern Railway it did not credit to the defendant, Sacramento Northern Railway, any interest payments on \$5,227,706 of Bonds of the Sacramento Northern Railroad (predecessor Company Bonds assumed by Sacramento Northern Railway) and did not credit to the defendant, Sacramento Northern Railway, any payment on account of principal or interest on advances which it had made in amounts (some represented by notes, some by open account) aggregating \$9,425,000 but allowed interest claims to back up and accumulate so that as of June 30, 1945 the defendant, The Western Pacific Railroad Company, appeared from the books of account to be a creditor of the defendant, Sacramento Northern Railway, in the amount of \$22,964,324. Although this indebtedness is still carried on such books it has not been treated by the defendant, The Western Pacific Railroad Company, as lawful indebtedness which it could enforce to the detriment of the plaintiff as creditor of the defend-

ant, Sacramento Northern Railway. That this is the position of the defendant, The Western Pacific Railroad Company, is clear from its course of conduct as outlined above and as fortified by its action in causing the valid and unpaid indebtedness of the plaintiff in the principal amount of \$856,260 to be pledged with The Railroad Credit Corporation as Accommodation Collateral for a loan obtained by the defendant, The Western Pacific Railroad Company, from The Railroad Credit Corporation without then asserting that it held claims against the defendant, Sacramento Northern Railway, aggregating \$22,964,324 or thereabout, or nearly double the amount of the then total assets of the Sacramento Northern Railway as shown by its books. That said loan has been fully satisfied and The Railroad Credit Corporation fully indemnified out of collateral furnished by The Western Pacific Railroad Company without resort to the Accommodation Collateral. Applying the Deep Rock Doctrine to the debts appearing on the books of the defendant, Sacramento Northern Railway, to (1) the plaintiff, and (2) the defendant, The Western Pacific Railroad Company, there could be little question that the defendant, The Western Pacific Railroad Company, would not be permitted to interpose the book credits of its wholly owned subsidiary, the defendant, Sacramento Northern Railway, as against the debt of the latter to the plaintiff even if such debt had not acquired an independent status as the result of the reorganization consummated as of December 31, 1945. But there can be no question at all on that point now that the plaintiff has acquired an independent status

as the result of said reorganization. The unpaid loans of the plaintiff to the defendant, Sacramento Northern Railway, were of value and benefit to it only so long as the inter-corporate relationship existed between it and the defendant, the Western Pacific Railroad Company. When the reorganization of said last mentioned Company was effected by its security holders and the entire stockholdings of the plaintiff in said last named defendant were surrendered its loans to the defendant, Sacramento Northern Railway, and the plaintiff itself acquired each an independent status and the plaintiff stepped into the position of any creditor of the Sacramento Northern Railway other than its proprietor, the defendant, The Western Pacific Railroad Company. Any other benefit to the plaintiff as the result of the making of the loans to the Sacramento Northern Railway, thereupon disappeared. On the other hand all benefits which the defendant, The Western Pacific Railroad Company, obtained by the making of the loans to the defendant, Sacramento Northern Railway, for the maintenance of a continuous flow of traffic continued. The creditors of the defendant, The Western Pacific Railroad Company, who succeeded to its ownership in the reorganization accepted this ownership with knowledge that the prior owner, the plaintiff, had loaned money to a wholly owned subsidiary, the Sacramento Northern Railway, and that the creditor making this loan would achieve a wholly independent status upon the effectuation of the reorganization. Equity will not permit the reorganized The Western Pacific Railroad Company to interpose its own alleged credits to its subsidiary in an amount

which would render the independent claim of the plaintiff substantially valueless while retaining for itself all of the benefits enjoyed by its continuance of the ownership of the defendant, Sacramento Northern Railway.

X.

That an analysis of the accounts of the defendants, Sacramento Northern Railway and The Western Pacific Railroad Company, in relation to the earnings of each from interchanged traffic and a restatement of such accounts on the basis of an appropriate formula will, as the plaintiff verily believes, show that the defendant, The Western Pacific Railroad Company, has absorbed earnings of the Sacramento Northern Railway far in excess of the full amount of the principal of and accrued interest upon the plaintiff's claim in the amount of \$1,441,390.55.

XI.

That the defendant, American Trust Company, is Trustee under an Indenture dated July 1, 1918, securing Bonds outstanding in the amount of \$5,224,373 or thereabouts. Said Indenture and the Bonds issued thereunder were executed by Sacramento Northern Railroad and were assumed by the defendant, Sacramento Northern Railway and constitute a lien upon properties for which the aforesaid principal sum of \$856,260 represents unpaid purchase money, and as Trustee under said Indenture said American Trust Company has an interest in the subject matter of this suit.

Wherefore, the plaintiff prays:

1. That the plaintiff's claim in the amount of \$1,441,390.55 be adjudged and decreed to be secured by a first and paramount lien on all of the properties of the defendant, Sacramento Northern Railway and an equitable charge against the revenues derived by the defendant, The Western Pacific Railroad Company, from traffic delivered to it by the defendant, Sacramento Northern Railway.

2. That the defendant, The Western Pacific Railroad Company, be directed and decreed to account to the defendant, Sacramento Northern Railway, for the benefit of the plaintiff as its sole creditor for its just and equitable share as originating carrier of all revenues received and retained by the defendant, The Western Pacific Railroad Company, in traffic delivered to it by the Sacramento Northern Railway up to but not in excess of \$1,441,390.55 and be directed and decreed to pay the amount so found to be due to the defendant, Sacramento Northern Railway for account of the plaintiff.

3. That in default of full payment of said sum the plaintiff have leave to apply to this Court at the foot of the decree herein for such further relief by way of judicial sale of and interim receivership of the properties of the defendant, Sacramento Northern Railway, as circumstances may require and as may be agreeable to the usages of equity.

4. That the plaintiff may have such other and further relief as to the Court may seem meet.

Dated July 9, 1946.

THE WESTERN PACIFIC RAILROAD CORP.,

By LEROY R. GOODRICH,
Its Attorney.

Of Counsel:

F. C. NICODEMUS, JR.,
A. PERRY OSBORN.

[Endorsed]: Filed Aug. 30, 1946.

[Title of District Court and Cause.]

ORDER TO THE WESTERN PACIFIC RAIL-
ROAD CORPORATION TO SHOW CAUSE
WHY IT SHOULD NOT BE ADJUDGED
GUILTY OF CONTEMPT

It appearing by the verified petition of The Western Pacific Railroad Company, debtor (now discharged) in the above-entitled proceeding, that the Western Pacific Railroad Corporation, a party to this proceeding, has commenced an action in this Court (No. 26333-H) which asserts a claim against the said The Western Pacific Railroad Company in violation of this Court's Final Order in this proceeding date March 28, 1946; and the Court being fully advised, it is hereby

Ordered, that The Western Pacific Railroad Corporation show cause before this Court in the courtroom of the undersigned judge of said Court, in the United States Post Office and Court House Build-

ing, in the City and County of San Francisco, State of California, on the 23rd day of September, 1946, at 10 o'clock A.M., why it should not be adjudged guilty of and punished for contempt of this Court for violation of the said Final Order dated March 28, 1946, and why this Court should not grant petitioner such other and further relief, including its costs and damages, as may be proper in the premises.

Service of this order, together with a copy of the petition upon which it was granted, on or before September 10, 1946, shall be sufficient service thereof.

Dated: August 30, 1946.

/s/ A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Aug. 30, 1946.

[Title of District Court and Cause.]

ANSWER AND RETURN OF THE WESTERN
PACIFIC RAILROAD CORPORATION TO
PETITION AND TO ORDER TO SHOW
CAUSE

Comes now The Western Pacific Railroad Corporation and in answer to the petition of The Western Pacific Railroad Company, in the above-entitled proceeding, and in conformity with the order of the court to show cause why The Western Pacific Railroad Corporation should not be adjudged guilty of and punished for contempt of

this court for violation of its final order dated March 28, 1946, and respectfully shows:

I.

This respondent admits that on the 24th day of August, 1946, it commenced in this court an action numbered 26333-H, entitled "The Western Pacific Railroad Corporation, Plaintiff, vs. Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants."

II.

Respondent denies that the filing of said action constitutes a violation of the final order of this court in the above-entitled bankruptcy proceeding dated March 28, 1946, for the following reasons:

(1) The basic purpose of the injunctive order made by this court on March 28, 1946, was to prevent any attempt to relitigate matters concluded by the reorganization proceedings brought to a close by said order.

(2) The Bill of Complaint filed by The Western Pacific Railroad Corporation on August 24, 1946, in this court numbered 26333-H, does not seek in any manner to violate the terms of the injunctive order nor to relitigate any matters concluded by the reorganization proceedings. On the contrary it was drawn by the plaintiff therein with meticulous care not to infringe upon either the letter or the spirit of the injunctive inhibition.

(3) The Bill asserts, in paragraphs IV and V

thereof, a primary claim against one of the defendants named therein, Sacramento Northern Railway, for money due the plaintiff on an indebtedness as set forth therein. It seeks to secure primarily a money judgment or decree against Sacramento Northern Railway on a claim for money loaned to Sacramento Northern Railway and unpaid, the validity of which claim is not disputed, and to enforce such judgment of decree, if secured, against the property of that defendant.

(4) Secondly, the Bill seeks to secure from the Defendant, The Western Pacific Railroad Company, an accounting to Sacramento Northern Railway, for the benefit of the plaintiff, as the creditor of the latter corporation, for its just and equitable share as originating carrier to all revenues, if any, received and retained by The Western Pacific Railroad Company in traffic delivered to it by the Sacramento Northern Railway up to but not in excess of the claim of the plaintiff against Sacramento Northern Railway.

(5) It must be clear to the court that the Bill of Complaint in no way asserts a general and direct claim against The Western Pacific Railroad Company. Its claim is primarily against Sacramento Northern Railway. It has included in this complaint The Western Pacific Railroad Company only because The Western Pacific Railroad Company, as it set forth in said complaint, collects and holds moneys arising out of interline business and interline settlements which are due to and the property of Sacramento Northern Railway.

(6) No relief is asked against The Western Pa-

cific Railroad Company, except in the event that (a) it can establish in this court its right to secure satisfaction of said indebtedness from Sacramento Northern Railway, and (b) it cannot secure full satisfaction of said indebtedness. In such an event it seems clear to this plaintiff that it should then be able to require of The Western Pacific Railroad Company an accounting to Sacramento Northern Railway for any amounts which may be due the latter under unsettled, unadjusted interline accounts between these two autonomous carriers.

The principle is well settled that interline settlements among carriers for the amounts due thereunder are accorded a preference over mortgage liens. This principle is well established and is sustained by the authorities cited and attached hereto.

(7) The same principle underlies prior orders of this court which specified claims which The Western Pacific Railroad Company, or its reorganization trustees, might pay currently out of income impounded by the mortgage trustees including "claims arising out of rate divisions, interline settlements, per diem accounts, switching reclaims, proportion of reparation awards, and freight charges or adjustments respecting shipments with transit or storage privileges and other charges or adjudgments of like character between carriers in the conduct of their joint business, regardless of when accrued."

In the order of the Interstate Commerce Commission of June 21, 1939, constituting the Plan of Reorganization which it then certified to the Dis-

trict Court there is excluded from the operation of the Plan "claims against the debtor entitled to priority over any mortgage of the debtor, current liabilities and obligations incurred by the Trustees of the property of the debtor during the reorganization proceedings, and expenses of reorganization allowed by the court within the maximum fixed by this Commission shall be paid in cash or assumed by the reorganized company."

(8) It is therefore quite obvious that the District Court did not have the power or jurisdiction under Section 77 to deal injunctively or otherwise with the kind of a claim plaintiff now seeks to enforce against Sacramento Northern Railway primarily and against the Reorganized Company, only to the extent of amounts due on interline settlements.

(9) Nor does an examination of the critical orders entered in the reorganization proceeding indicate any attempt on the part of the District Court to interfere with a litigation of claims of this character, but on the contrary such orders seem clearly to recognize their excepted status.

(10) The Bill of Complaint filed by The Western Pacific Railroad Corporation, insofar as it seeks relief against The Western Pacific Railroad Company, is expressly limited and stated in paragraph VIII thereof (page 7) to be a claim "upon the revenues derived by the defendant, The Western Pacific Railroad Company, from traffic originating on the lines or at the terminals of the defendant, Sacramento Northern Railway, to the extent that

the plaintiff's claim against such revenues is entitled to priority over the mortgages of the defendant, The Western Pacific Railroad Company, which have been released under the Plan of Reorganization and orders of this Court in the reorganization proceeding hereinbefore referred to."

As to the claims so set forth in its Bill, The Western Pacific Railroad Corporation, respondent, respectfully expresses its belief that it is entitled to its day in court and therefore prays that it be found not guilty of any violation of any injunctive order of this court and that it be discharged and purged of any charge of contempt.

THE WESTERN PACIFIC
RAILROAD CORPORATION

By
Its Attorney.

Of Counsel

F. C. NICODEMUS, JR.,
A. PERRY OSBORN.

State of California,
County of Alameda—ss.

Leroy R. Goodrich, being first duly sworn, deposes and says:

That he is the attorney for The Western Pacific Railroad Corporation answering herein; that said corporation is absent from the County of Alameda; that your affiant maintains his law office in the County of Alameda, State of California, and makes this affidavit for and on behalf of said The Western Pacific Railroad Corporation; that he has read the

foregoing Answers, etc., and knows the contents thereof and that he knows of his own knowledge that all of the allegations set forth therein are true.

/s/ LEROY R. GOODRICH.

Subscribed and sworn to before me this 21st day of September, 1946.

(Seal) JOHN A. BRENNAN,
Notary Public in and for the County of Alameda,
State of California.

MEMORANDUM OF POINTS AND AUTHORITIES

Order of Interstate Commerce Commission, June 21, 1939, certifying Plan of Reorganization.

Order of District Court approving plan August 15, 1940, paragraph 3, subsection (b).

Order of District Court directing carrying out of Plan November 27, 1944, section 9.

Final order of District Court March 28, 1946, paragraph 6.

Booth v. Hoskins, 75 Cal. 271, 3 Jones on Bonds and Bond Securities, 4th Ed. Secs. 1356; 1358, pp. 145, 149.

Miltenberger v. Logansport Railway, 106 U.S. 286, 311, 312.

Farmers Loan and Trust Company v. Vicksburg & M. Railway Co. 33 Fed. 778.

Easton v. Houston & T. C. Ry. Co. 38 Fed. Rep. 12.

[Endorsed]: Filed Sept. 23, 1946.

[Title of District Court and Cause.]

Reply of Petitioner, The Western Pacific Railroad Company, to Answer and Return of The Western Pacific Railroad Corporation to Petition and to Order to Show Cause

Comes now the petitioner, The Western Pacific Railroad Company, and, by leave of Court, files its reply to the answer and return of The Western Pacific Railroad Corporation to petition and to order to show cause herein, insofar as reply is deemed necessary, and respectfully shows:

I.

Petitioner denies:

(a) that said Bill of Complaint sets forth that petitioner “collects and holds moneys arising out of interline settlements which are due to and the property of Sacramento Northern Railway.” (Sub-paragraph (5), Section II, p. 3);

(b) that said Bill of Complaint seeks “to require of The Western Pacific Railroad Company an accounting to Sacramento Northern Railway for any amounts which may be due the latter under unsettled, unadjusted interline accounts between these two autonomous carriers” (Sub-paragraph (6), Sec. II, p. 3);

(c) that the claim which the respondent now seeks to enforce against the petitioner “is only to the extent of amounts due on interline settlements” (Sub-paragraph (8), Section II, p. 4).

In this behalf petitioner alleges that nowhere in said Bill of Complaint it is alleged that any amount

is or has been due or unpaid from petitioner to Sacramento Northern Railway on any interline settlement made in accordance with agreed or established bases for the division of rates and revenue between connecting carriers, or that any amount is or has been due and owing from petitioner to Sacramento Northern Railway under unsettled, unadjusted interline accounts, or that there are or have been any such unsettled or unadjusted interline accounts between said Sacramento Northern Railway and petitioner. On the contrary, it appears upon the face of said Bill of Complaint that the respondent seeks a retrospective redetermination of divisions of rates and thereby a re-allocation of revenues to the Sacramento Northern Railway and The Western Pacific Railroad Company, respectively, on business originating on the Sacramento Northern Railway and interchanged with The Western Pacific Railroad Company for a period in excess of fifteen years; that the Bill of Complaint seeks "a restatement" of the interline accounts between the Sacramento Northern Railway and petitioner throughout said period in excess of fifteen years, and prays that, after such restatement shall have been made, the petitioner be required to account to Sacramento Northern Railway, and thereby to the respondent, in amounts alleged by the Bill of Complaint to be much greater than the amounts shown in the actual interline accounts and interline settlements between said Sacramento Northern Railway and petitioner.

II.

Petitioner denies that the claim which respondent

seeks by its Bill of Complaint to enforce against the petitioner is a claim "against the debtor entitled to priority over any mortgage of the debtor" or that said claim had or has an "excepted status." (Sub-paragraphs (7), (9) and (10) of Section II, pp. 4 and 5.) In this behalf petitioner alleges that said claim was an unsecured claim, and not entitled to priority over any mortgage, when it accrued in 1928 as alleged in the Bill of Complaint and that, as appears from the Bill of Complaint, it continued to be an unsecured claim and not entitled to priority over any mortgage throughout the entire period of more than sixteen years from the date of its alleged accrual until the consummation of the reorganization of The Western Pacific Railroad Company.

Wherefore petitioner prays that this Court shall find and determine that the said answer and return of The Western Pacific Railroad Corporation to the petition and to the order to show cause herein fails to show cause why The Western Pacific Railroad Corporation should not be adjudged guilty of, and punished for, contempt of the said Final Order of this Court, and that the Court shall further find that petitioner is entitled to the relief prayed for by its petition herein.

/s/ ALLAN P. MATTHEW,

/s/ ROBERT L. LIPMAN,

/s/ BURNHAM ENERSEN,

Attorneys for The Western
Pacific Railroad Company.

Of counsel

McCutchen, Thomas, Matthew, Griffith &
Greene.

State of California,
City and County of San Francisco—ss.

Charles Elsey, being first duly sworn, deposes and says:

That he is the President of The Western Pacific Railroad Company. That he has read the foregoing reply and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ CHARLES ELSEY.

Subscribed and sworn to before me this 1st day of October, 1946.

(Seal) /s/ FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 2, 1946.

[Title of District Court and Cause.]

Order Adjudging the Western Pacific Railroad Corporation Guilty of Contempt of the Final Order of This Court Herein.

The petition of The Western Pacific Railroad Company, the Debtor herein, now discharged, for an order adjudging The Western Pacific Railroad Corporation guilty of contempt of the Final Order of this Court dated March 28, 1946, in the above-entitled proceeding, came on regularly for hearing

and was heard by the Court pursuant to the Order to Show Cause issued thereon, and briefs having been filed as permitted by the Court, the matter has been submitted to the Court for decision.

The Court, being fully advised, finds:

(a) That The Western Pacific Railroad Corporation is a corporation created and existing under the laws of the State of Delaware, and is a party to the above-entitled reorganization proceeding.

(b) That a copy of the Final Order of this Court made and filed herein on March 28, 1946, was duly served on The Western Pacific Railroad Corporation within thirty days after March 28, 1946.

(c) That no appeal was taken from said Final Order, that the time for appeal therefrom has expired, and that said Final Order has become final and is now in full force and effect.

(d) That on August 24, 1946, said The Western Pacific Railroad Corporation commenced in this Court an action against the petitioner and others numbered 26333-H and entitled "The Western Pacific Railroad Corporation, Plaintiff, vs. Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants"; and that on August 27, 1946, the petitioner was served with the summons and a copy of the bill of complaint in said action, a copy of which bill of complaint is attached to and incorporated in said petition.

(e) That said action No. 26333-H is still pending in this Court.

(f) That in and by said action The Western Pacific Railroad Corporation has asserted and now asserts a claim against the petitioner which, if it exists at all, existed on and before December 28, 1944, and was released and discharged by said Final Order; that the assertion of such a claim was and is barred and enjoined by said Final Order; and that the commencement of said action is not and has not been provided for or permitted by any order of this Court.

(g) That in commencing and in maintaining said action against The Western Pacific Railroad Company, The Western Pacific Railroad Corporation has violated and continues to violate said Final Order of this Court in this proceeding.

The Court further finds and concludes that The Western Pacific Railroad Corporation is guilty of contempt of said Final Order of this Court in commencing and maintaining said action No. 26333-H against The Western Pacific Railroad Company.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That The Western Pacific Railroad Corporation is in contempt of this Court.

2. That The Western Pacific Railroad Corporation shall pay to The Western Pacific Railroad Company the full amount of all costs, counsel fees and

damages paid, incurred or suffered by The Western Pacific Railroad Company by reason of or on account of the commencing and maintaining of said action No. 26333-H against it, which amount shall be determined by this Court upon application therefor by The Western Pacific Railroad Company and after a hearing upon such application not less than five days after notice to and service of a copy of such application upon counsel for The Western Pacific Railroad Corporation.

3. That The Western Pacific Railroad Corporation may purge itself of such contempt by dismissing its said action No. 26333-H as to The Western Pacific Railroad Company within the period of fifteen (15) days following service of a copy of this order upon counsel for The Western Pacific Railroad Corporation, and in case it shall so dismiss said action within said fifteen-day period The Western Pacific Railroad Corporation shall be released from its obligation to make payment to The Western Pacific Railroad Company as provided in the preceding paragraph of this order.

Dated: March 19, 1947.

/s/ A. F. ST. SURE,
Judge.

[Endorsed]: Filed Mar. 20, 1947.

[Title of District Court and Cause.]

Petition of the Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, Dated March 28, 1946.

The Western Pacific Railroad Corporation, a corporation of the State of Delaware, herein called the "Petitioner," represents to this Court and petitions as follows:

1. The Petitioner is a creditor of Sacramento Northern Railway, a wholly owned subsidiary of The Western Pacific Railroad Company, debtor in these proceedings, the indebtedness due including interest accrued to June 30, 1947, amounting to \$1,511,606.21.

2. Said Sacramento Northern Railway is without funds or liquid or unmortgaged assets with which to pay such indebtedness, but as the Petitioner is informed and verily believes to be true, it has a just and equitable claim against its parent said Western Pacific Railroad Company in an amount more than sufficient to discharge all of said indebtedness, principal and interest; such claim being one arising out of unaudited and unsettled inter-line carrier accounts between said Sacramento Northern Railway and said Western Pacific Railroad Company.

3. The Petitioner, as a creditor of said Sacramento Northern Railway, has an equitable right to bring and prosecute a derivative action against said Western Pacific Railroad Company in favor of the

Sacramento Northern Railway (since any suit brought by Sacramento Northern Railway itself against said Western Pacific Railroad Company, its own parent would in contemplation of a court of equity be a suit by the parent against itself) to enforce said claim and to require Sacramento Northern Railway to apply the moneys recovered in such action upon said claim to the payment of the Petitioner's claim against Sacramento Northern Railway in the amount of \$1,511,606.21, but for the reasons hereinafter set forth and alleged the Petitioner is unwilling to institute, prosecute or pursue or attempt to institute, prosecute or pursue such a derivative suit against said Western Pacific Railroad Company unless and until this Court shall clarify or modify the sweeping injunctive provisions of its Final Order of March 28, 1946, which are alleged to inhibit and bar such relief against the Western Pacific Railroad Company.

4. The derivative action which the Petitioner represents that it is equitably entitled to prosecute against said Western Pacific Railroad Company is based upon the following state of facts: for many years the Sacramento Northern Railway has owned and operated an interurban electric railway engaged in transporting both passengers and freight to and from the rich and productive territory in and tributary to the Sacramento Valley, the line extending from Sacramento to Chico, with branches to Oroville, Colusa and Woodland, and a detached line running southwesterly from Vacaville. In or about 1928 the Sacramento Northern Railway acquired

lines of railroad from or of the San Francisco-Sacramento Railroad Company for the purpose of extending the traffic producing territories from which its parent, said Western Pacific Railroad Company, would derive additional long-haul revenue producing traffic. By this means additional areas were opened up to said Western Pacific Railroad Company in Alameda, Contra Costa, Solano, Yolo and Sacramento Counties, at a total cost of \$1,675,000 of which the principal indebtedness due the Petitioner from said Sacramento Northern Railway is or represents a part.

5. Said Sacramento Northern Railway enlarged in the manner and by the process above outlined has always been operated autonomously, although some if not all of its organization or personnel are also officers or employees of its parent, said Western Pacific Railroad Company, and all of the traffic originated and gathered by it has been delivered by it to said Western Pacific Railroad Company as a connecting carrier in accordance with the usages and practices of the railway industry and with the provisions of the Interstate Commerce, all of which require just and equitable rates and fair and equitable division thereof between connecting and participating carriers. Such method of operation was pursued by said Western Pacific Railroad Company prior to the appointment in 1935 of Trustees in this proceeding, was continued by the Trustees during the full period of the trusteeship and since the trusteeship ended has been pursued by the reorganized Western Pacific Railroad Company but at

no time during any of these three operating periods has there been an audit and judicial settlement of the inter-line accounts of and between Sacramento Northern Railway and said Western Pacific Railroad Company and its Trustees.

6. Under the law and usages and practices of the railroad industry inter-line accounts are running accounts which are subject to audit at any time without regard to the statutes of limitation because the statutes always run from the date of the latest entry and new entries occur daily and under a long line of judicial decisions in federal courts any credit balance shown to be due on such an audit is a preferential claim entitled to priority over mortgage liens.

7. The Petitioner respectfully represents that Sacramento Northern Railway is entitled to an audit of its inter-line accounts with Western Pacific Railroad Company and that such an audit will show that at all times the division of through rates on inter-changed business has involved a loss to Sacramento Northern Railway and a profit to Western Pacific Railroad Company, except that in certain war years said Sacramento Northern Railway was also operating profitably. The Petitioner further represents that said Western Pacific Railroad Company has received in business delivered to it by Sacramento Northern Railway more than \$21,000,000 of gross revenue of which under any just segregation formula more than 50% would be net profit fairly and justly chargeable against said Western Pacific Railroad Company in any equit-

able retroactive adjustment of the divisions underlying such inter-line settlements.

8. The Petitioner respectfully represents that the Final Order of March 28, 1946, was not intended by the Court to interfere with or interdict the normal and customary accounting practices and commercial relations between said Western Pacific Railroad Company or its Trustees and its connecting carriers and was not intended to legislate new or shortened periods of limitation or to permit the reorganized Western Pacific Railroad Company to gain any unconscionable advantage over any person having a just and equitable claim against the trust estate or against its Trustees but by reason of the broad injunctive provisions of the said Order of March 28, 1946, it is claimed that connecting carriers of said Western Pacific Railroad Company and all carriers participating in the transportation of traffic received from or delivered to said Western Pacific Railroad Company are barred from any audit or judicial settlement of their accounts prior to December 28, 1944.

9. The Petitioner further represents that the true intent and purpose of the Final Order of March 28, 1946, was to prevent the reassertion of claims against the Debtor Railroad Company which existed at the date the Debtor's properties were placed in judicial custody, August 2, 1935, and which were cut off or intended to be cut off by the Plan of Reorganization as of its effective date January 1, 1939, and was not intended to cut off valid and subsisting claims against the Trustees created by or resulting from business transacted

by and with the Trustees during the period of judicial operation and administration; in short this Court did not by its Order of March 28, 1946, intend to repudiate any of its own obligations or what is tantamount thereto, the obligations of its Trustees.

Accordingly, the Petitioner respectfully asks that this Court enter a supplemental Order clarifying or amending its Final Order of March 28, 1946, so as to permit the Petitioner to institute a suit against, or to reform a suit heretofore instituted against, Sacramento Northern Railway, said Western Pacific Railroad Company and others (but dismissed as to the Western Pacific Railroad Company on April 18, 1947) by setting forth in the right of Sacramento Northern Railway its claim against Western Pacific Railroad Company for a judicial settlement of their interline carrier accounts for the periods: (a) from the date of the audit to December 28, 1944, being the post reorganization period; (b) from December 28, 1944, to August 2, 1935, being the full period of judicial operation; and (c) from August 2, 1935, back to and through, but not beyond the period in which such settlements are entitled to priority over then existing mortgage indebtedness of said Western Pacific Railroad Company and are expressly exempted from the injunctive provisions of the Order of March 28, 1946, and that this Court grant such other and further relief in the premises as to the Court may seem meet.

Upon the hearing of this petition, the Petitioner with the permission and under the protection of

this Court will be prepared to submit the form of Bill of Complaint which they desire to file.

All of which is most respectfully submitted.

Dated: August 18, 1947.

THE WESTERN PACIFIC
RAILROAD CORPORATION,

By /s/ LEROY R. GOODRICH,
Its Attorney.

Of Counsel

FRANK C. NICODEMUS, JR.,
A. PERRY OSBORN.

State of New York,
County of New York—ss.

M. J. Curry, being first duly sworn, deposes and says:

That he is the President of The Western Pacific Railroad Corporation; that he has read the foregoing Petition and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ M. J. CURRY.

Subscribed and sworn to before me this 18th day of August, 1947.

(Seal) /s/ HOWARD A. FISCHER,
Notary Public in the State of New York. Residing
in Kings County.

Commission expires March 30, 1948.

[Endorsed]: Filed Sept. 30, 1947.

[Title of District Court and Cause.]

Answer and Return of The Western Pacific Railroad Company to Petition of the Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, Dated March 28, 1946.

Comes now The Western Pacific Railroad Company, Debtor (now the Reorganized Company and hereinafter referred to as the Company) in the above-entitled proceeding, and for its answer and return to the "Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, dated March 28, 1946" (hereinafter referred to as the petition), respectfully shows:

FIRST DEFENSE

Reply to Allegations of Petition

1. Answering the allegations of paragraph 1 of the petition, denies that Petitioner is a creditor of Sacramento Northern Railway in the sum of \$1,511,-606.21 or any other sum and alleges that Petitioner's asserted claim against Sacramento Northern Railway originated in 1928 and has long since been barred by the Statute of Limitations.

2. Answering the allegations of paragraph 2 of the petition, denies that Sacramento Northern Railway has a just or equitable or any claim against the Company arising out of unaudited or unsettled interline carrier accounts. In this behalf alleges that the terms "interline account" and "interline settlement" are conventional terms, having in rail-

road accounting practice well recognized and established meanings, viz:

(a) An "interline account" is a monthly statement or report rendered by one carrier to another showing the apportionment of revenues on interline traffic in the transportation of which they both participate, that is, on traffic interchanged between them (including traffic in the transportation of which other carriers also participate), and showing also the net sum payable by or to the reporting carrier, such apportionment of revenues being determined in accordance with the tariff rates and the divisions of such tariff rates currently applicable, as established either by agreement or by order of the Interstate Commerce Commission or of other regulatory authority.

(b) On "interline settlement" is the payment by the debtor carrier to the creditor carrier of the net balance shown to be due under the interline accounts so rendered by such carriers to each other for the same period. Further alleges that it has long been, and continuously was throughout the entire period specified in the petition herein, and now is the customary and established practice in the railroad industry for carriers to render interline accounts, to audit the same and to make interline settlements in each month for the business interchanged between them during the immediately preceding calendar month. Further alleges that ever since they have interchanged traffic the Company and the Sacramento Northern Railway have had agreed and established divisions of rates covering such traffic and

upon the basis thereof and in accordance with the aforesaid customary and established practice in the railroad industry they have rendered monthly, each to the other, interline accounts covering the business interchanged between them during the immediately preceding calendar month, which accounts were thereupon audited and within the month the interline settlements of such accounts were made, all in the regular course of business, except that in certain instances and by reason of special circumstances an interline settlement may have been deferred for a period not exceeding a few months. Further alleges that there are not now nor were there at the time when Petitioner filed its said petition herein any unaudited or unsettled interline accounts between the Company and said Sacramento Northern Railway relating to or covering any business interchanged between them either during the period preceding August 2, 1935, or during the period extending from August 2, 1935 to December 28, 1944, referred to in the petition herein as "the full period of judicial operation," but that all of the interline accounts for said periods have long since been audited, settled and closed. Denies that the claim which Petitioner seeks leave to assert in behalf of Sacramento Northern Railway is a claim for unaudited or unsettled interline carrier accounts and alleges that said claim is in fact a claim for a retroactive readjustment of the divisions of rates on the business that has been interchanged between the Company and Sacramento Northern Railway for an indefinite period extending many years into the past and,

based thereon, a reallocation of the revenues on such business to Sacramento Northern Railway.

3. Answering the allegations of paragraph 3 of the petition, denies that Petitioner, as creditor of Sacramento Railway or otherwise, has an equitable or any right to bring or prosecute a derivative or any action against the Company, either in favor of Sacramento Northern Railway or otherwise, to enforce any claim whatever and particularly any claim originating or existing prior to December 28, 1944.

4. Answering the allegations of paragraph 4 of the petition, denies that Petitioner is equitably or otherwise entitled to bring any derivative action against the Company and denies that any indebtedness is due from Sacramento Northern Railway to Petitioner.

5. Answering the allegations of paragraph 5 of the petition, admits that most but denies that all of the traffic originated and gathered by Sacramento Northern Railway has been delivered to the Company and alleges the fact to be that some of such traffic was delivered by the Sacramento Northern Railway to other connecting carriers. Alleges that the interline accounts between Sacramento Northern and the Company have been regularly, currently and duly audited and settled monthly as hereinbefore alleged and denies that there ever has been or that there now is any occasion for any judicial settlement thereof.

6. Answering the allegations of paragraph 6 of the petition, denies each and all of the allegations of said paragraph 6.

7. Answering the allegations of paragraph 7 of

the petition, denies each and all of the allegations of said paragraph 7.

8. Answering the allegations of paragraph 8 of the petition, denies that Petitioner or Sacramento Northern Railway has any just or other claim against the Company originating prior to December 28, 1944 and denies that said Final Order of March 28, 1946, enjoins the assertion or enforcement of any claim existing prior to December 28, 1944 that was not intended to be enjoined thereby, and denies generally the correctness of Petitioner's interpretation of said Final Order as in said paragraph 8 of the petition set forth.

9. Answering the allegations of paragraph 9 of the petition, denies that either Petitioner or Sacramento Northern Railway has any valid or subsisting claim against the Company created by or resulting from either (a) the business transacted by the Trustees of the Company's properties during the period of reorganization extending from August 2, 1935, to December 28, 1944, referred to in the petition herein as "the full period of judicial operation", or (b) the business transacted by the Company prior to the filing of its petition for reorganization on August 2, 1935, and denies generally the correctness of Petitioner's interpretation of said Final Order of March 28, 1946, as in said paragraph 9 of the petition set forth.

10. Answering the paragraph commencing on line 7 and ending on line 27 of page 6 of the petition, denies that Petitioner is entitled to the relief or any of the relief in said paragraph prayed for.

11. Denies each and all of the allegations of said petition not specifically admitted in this Answer.

SECOND DEFENSE

Petitioner's Claim for a "Clarification" of the Final Order Herein Dated March 28, 1946 Has Already Been Determined Adversely to Petitioner and is Barred as Res Judicata

As a further answer and return to Petitioner's said petition the Company respectfully shows:

1. By its said petition Petitioner represents that it is a large creditor of Sacramento Northern Railway, a wholly-owned subsidiary of the Company; that Sacramento Northern Railway is without funds or unmortgaged assets with which to pay said indebtedness to Petitioner, but has the claim against the Company next referred to which is sufficient to discharge said indebtedness; that Sacramento Northern Railway's supposed claim against the Company is one based upon what is asserted to be the right of Sacramento Northern Railway to have a retroactive readjustment made of the divisions of rates on the business that has been interchanged between the Company and Sacramento Northern Railway for an indefinite period in the past commencing many years prior to the filing of the petition for reorganization herein on August 2, 1935, and, based thereon, a reallocation of the revenues on such business to Sacramento Northern Railway, because, so Petitioner avers, these divisions have resulted in a loss to Sacramento Northern Railway; that Petitioner, as a creditor of Sacramento Northern Railway, is entitled to reach in equity such alleged claim in order to satisfy the asserted indebtedness of Sacramento Northern Railway to Petitioner; that for that purpose Peti-

tioner asserts the right to bring a derivative action against the Company on behalf of said Sacramento Northern Railway to realize upon said alleged claim; that such alleged claim is entitled to priority over the mortgages of the Company and therefore was not barred or discharged by the prior orders of this Court barring and discharging unsecured claims against the Company existing on or before December 28, 1944; that the injunctive provisions of said Final Order were not intended to inhibit or bar the bringing of such an action, but, because of the breadth of said injunctive provisions, Petitioner is unwilling to bring such an action until said Final Order is clarified or modified so as to permit the institution by Petitioner of such derivative action.

2. Petitioner's petition divides the alleged claim of the Sacramento Northern Railway into the following three periods: (a) the period since December 28, 1944, when the railroad and other properties of the Company were returned to and revested in it, such period being referred to in the petition as "the post reorganization period"; (b) that part of the reorganization period from the beginning of reorganization on August 2, 1935 to December 28, 1944, referred to in the petition as "the full period of judicial operation"; and (c) the pre-reorganization period prior to August 2, 1935. Petitioner cannot be here concerned with any claim arising from interline accounts or rate divisions for any period after December 28, 1944, viz., "the post reorganization period." On that date the Company's railroad

properties were revested in the Company as reorganized, and since that date the Company, for its own account and entirely independently of the bankruptcy court, participated in and maintained divisions of rates and interline account practices. Over those division of rates and interline account practices the bankruptcy court neither had nor undertook to exercise any jurisdiction whatever. Petitioner therefore does not present, nor can there be presented, any reason why this Court should take any action with respect to Petitioner's claim insofar as it relates to any period subsequent to December 28, 1944.

3. As to the period prior to December 28, 1944, the request of the Petitioner should be denied for several reasons, the first of which is the principle of *res judicata*. In this behalf the Company alleges that insofar as Petitioner seeks a "clarification" of said Final Order for the purpose of permitting said derivative action, Petitioner is simply seeking an interpretation or construction of the provisions of said Final Order which will not inhibit or bar the bringing of said action. Petitioner's claim to precisely this relief has heretofore been presented to and determined by this Court in the above entitled proceeding. This Court has, by its order herein dated March 19, 1947 and entered on March 20, 1947, determined said issue adversely to Petitioner. No appeal was taken from said last mentioned order nor has it been modified or set aside, but has long since become final. Said order is *res judicata* of said claim of Petitioner. In this behalf the Company alleges that—

(a) On the 24th day of August, 1946 Petitioner commenced in the District Court of the United States for the Northern District of California, Southern Division, action numbered 26333-H and entitled "The Western Pacific Railroad Corporation, Plaintiff, vs. Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants", a copy of the bill of complaint in which action, marked "Exhibit A", is attached hereto and is hereby incorporated herein and made a part hereof. Said action was a derivative action by Petitioner in the alleged right of Sacramento Northern Railway and asserted precisely the same claim that Petitioner's present petition herein now seeks leave to assert for a retroactive readjustment of the divisions between the Company and Sacramento Northern Railway and, based thereon, a reallocation of revenues to Sacramento Northern Railway on business originating on its lines and interchanged with the Company.

(b) On August 30, 1946 the Company filed its petition in the above entitled proceeding for an order requiring Petitioner to show cause why it should not be adjudged in contempt of this Court for disobeying said Final Order by bringing said action numbered 26333-H. A copy of said petition for an order to show cause, marked "Exhibit B", is attached hereto and is hereby incorporated herein and made a part hereof. Pursuant to said petition

therefor this Court on August 30, 1946 issued its order requiring Petitioner to show cause, a copy of which order, marked "Exhibit C," is attached hereto and is hereby incorporated herein and made a part hereof.

(c) On September 23, 1946 Petitioner filed its Answer and Return to said petition and order to show cause, a copy of which answer and return, marked "Exhibit D," is annexed hereto and is hereby incorporated herein and made a part hereof.

(d) On October 2, 1946 the Company filed its Reply to said answer and return of the Petitioner, a copy of which reply, marked "Exhibit E," is attached hereto and is hereby incorporated herein and made a part hereof.

(e) After proceedings duly and regularly had upon said petition for an order to show cause, Petitioner's said answer and return thereto and said reply of the Company, this Court made its order herein dated March 19, 1947 and filed March 20, 1947 determining and adjudging that the claim asserted by Petitioner in behalf of Sacramento Northern Railway in said action numbered 26333-H was released and discharged by said Final Order and that the assertion of said claim was barred and enjoined by said Final Order and that in commencing and maintaining said action numbered 26333-H Petitioner was guilty of contempt of this Court in disobeying said Final Order. A copy of said order dated March 19, 1947, marked "Exhibit F," is annexed hereto and is hereby incorporated herein and made a part hereof. No appeal was taken from said order dated March 19, 1947, nor has the same been

modified or set aside, but the same is now final and in full force and effect. To purge itself of said contempt Petitioner dismissed said action numbered 26333-H as to the Company, and a copy of said dismissal, marked "Exhibit G," is annexed hereto and is hereby incorporated herein and made a part hereof.

(f) Said order dated March 19, 1947 is a final and conclusive determination, binding upon Petitioner, that its asserted claim in behalf of Sacramento Northern Railway has been released and discharged, and that the assertion thereof is enjoined, by said Final Order. Said Order dated March 19, 1947 is res judicata of the issue now attempted to be asserted by Petitioner for a "clarification" of said Final Order.

THIRD DEFENSE

Petitioner's Petition Fails to State Any Ground for Modifying Said Final Order.

As a further answer and return to Petitioner's said petition the Company respectfully shows:

1. Petitioner's petition herein requests a modification of the injunctive provisions of said Final Order so as to permit Petitioner to bring a derivative action on the same alleged claim as that asserted in said action No. 26333-H. The ground now asserted as warranting a modification of said Final Order is that the alleged claim of Sacramento Northern Railway to a retroactive readjustment of divisions is a claim upon an interline settlement or account which had priority over the mortgages

of the Company and therefore was not cut off by the Plan of Reorganization or by the former orders of this Court and accordingly survived the reorganization and that the assertion of such claim was not intended to be interdicted by the Final Order, though the injunctive provisions of the Final Order were drawn so broadly as to bar such claims, wherefore Petitioner is unwilling to risk citation for contempt in bringing its proposed derivative action unless and until the Final Order shall be modified.

2. This contention has already been determined adversely to Petitioner by said order herein dated March 19, 1947, Exhibit F hereto, which is conclusive and binding upon Petitioner and is *res judicata* of this issue.

3. As stated under the Second Defense, the derivative action which Petitioner seeks leave to bring involves the assertion of the identical claim as the one asserted in said action numbered 26333-H. By said order dated March 19, 1947 this Court found and determined that the claim asserted in said action numbered 26333-H was "released and discharged by said Final Order." Entirely aside from the injunctive provisions of said Final Order, it has conclusively been determined as against Petitioner that the claim which Petitioner asks leave to assert "has been released and discharged." That Petitioner has no such claim as the one that it now seeks to assert is therefore determined and the matter is *res judicata*.

4. It having already been finally and conclusively determined that the claim Petitioner seeks

to assert has been released and discharged, Petitioner's petition does not and cannot state any ground for modifying the injunctive provisions of said Final Order to permit the assertion of such claim.

5. Said Final Order does, and was intended to, bar and enjoin the assertion of claims that had been released and discharged by the orders of this Court and accordingly no ground for modifying said Final Order has been shown.

FOURTH DEFENSE

The Petitioner Has No Standing to Assert Claims of Sacramento Northern Railway.

As a further answer and return to Petitioner's said petition, the Company respectfully shows:

1. Petitioner's claim depends upon an alleged indebtedness owing from Sacramento Northern Railway to Petitioner which arose in 1928. Sacramento Northern Railway and the Company each contends that this claim is barred by the Statute of Limitations. Petitioner thus far has done no more than to assert its claims; the defenses of Sacramento Northern Railway to the claim have not been tried; Petitioner has not obtained judgment; nor has Petitioner attempted unsuccessfully to satisfy any judgment which it might obtain. Under well-settled doctrines of creditor's rights, Petitioner in these circumstances has no standing to assert, speak for or to be in any way concerned with the claims, if any, which Sacramento Northern Railway

may have on its part against the Company or any other person.

2. Unless and until Petitioner shall obtain a judgment against Sacramento Northern Railway and a return of execution on that judgment unsatisfied, Petitioner's application to this Court is premature.

FIFTH DEFENSE

This Court Has No Jurisdiction to Modify the Final Order as Requested by Petitioner.

As a further answer and return to Petitioner's said petition, the Company respectfully shows:

1. By said Final Order the above entitled reorganization proceeding was terminated and the case was closed. No jurisdiction was reserved by the Court to modify the injunctive provisions of the Final Order to permit suit or action upon claims the assertion of which had been enjoined. The Court is accordingly without jurisdiction to grant the relief prayed for in Petitioner's petition. The case has not been reopened and no ground for reopening the case is attempted to be asserted. Nor, in view of the Court's order of March 19, 1947 determining that Petitioner's claim was released and discharged by the Final Order, can a case for reopening the above entitled proceeding be stated. Reopening is allowed only when the Court has power to grant the ultimate relief sought and here the ultimate relief is barred because the prior orders of the Court are *res judicata* of Petitioner's present claim.

Therefore, no case for reopening the reorganization proceeding can be stated.

2. This Court determined on March 19, 1947, that the assertion by Petitioner of its claims is enjoined by the Final Order. That order of March 19, 1947, constituted a full, complete and final determination of the meaning of the Final Order. This Court has no power to modify the terms of the Final Order as requested by Petitioner. A petition for an order terminating the reorganization proceeding was filed in this Court on March 18, 1946. This Court directed that a hearing on that petition take place on March 28, 1946, and that notice of the hearing be given to all parties to the reorganization, including the Petitioner. Notice was given as ordered. The hearing was held and the Final Order signed and filed on March 28, 1946. It was served on Petitioner as a party to the reorganization proceeding. Petitioner took no appeal from the order, and therefore may not now seek a modification of that order as requested by the petition herein.

SIXTH DEFENSE

The Petition Is Without Equity. This Court, If It Had Jurisdiction to Modify the Final Order, Should Not Exercise That Jurisdiction.

As a further answer and return to Petitioner's said petition, the Company respectfully shows:

1. As of December 29, 1944 the Plan of Reorganization in the above entitled proceeding was consummated, the Company's railroad and other prop-

erties were returned to and revested in it for operation by the reorganized company and thereupon the new securities of the Company, both bonds and stock, were issued pursuant to the Plan and since that time said bonds and stock have been freely traded in and many thereof have changed hands, and many new rights and interests have been acquired,—all in reliance upon the Plan as consummated and the former orders of this Court with respect thereto as determining and settling the rights of the parties and upon the basis that claims such as the one attempted to be asserted by Petitioner had been released and discharged and would not participate in the assets nor constitute a liability of the Company. This Court, by its Final Order entered in this proceeding on March 28, 1946, found, *inter alia*, that the Plan of Reorganization had been fully and properly carried out and put into effect, that all acts and things required by the Court's order of November 27, 1944, in order to consummate the Plan had been properly done or performed and that "the exchange of more than 99% of the principal amount of securities of the reorganized company has been effected in accordance with the plan of reorganization and the orders of this Court; and adequate and proper arrangements have been made for the exchange of the remainder of said securities." Petitioner was a party to the above entitled proceeding and had full opportunity to present its present claim therein but failed to do so. It would be unjust and inequitable, even if the Court had jurisdiction to do so, to

modify its prior orders so as to permit the belated assertion of this claim by Petitioner, to the detriment of those who acquired their rights and interests on the faith of the Plan and the prior orders of this Court. The petition is wholly without equity.

2. The divisions of rates between Sacramento Northern Railway and the Company were established at a time when Petitioner, as the owner of all the stock of the Company, had control over all activities of the Company and Sacramento Northern Railway, including divisions of rates established between them. Petitioner having had control over said divisions of rates cannot now be heard to complain of them. Petitioner for many years prior to the reorganization and at all times during the reorganization was fully familiar with the divisions of rates of which it now purports to complain. Neither prior to nor during the reorganization did Petitioner in any way question such divisions of rates. Under these circumstances Petitioner's request must be denied for laches.

3. Petitioner was an active party in the reorganization proceeding, throughout the entire period of reorganization. The claim that Petitioner now seeks to assert existed (if it ever existed at all) during the reorganization proceeding and could and should have been filed and asserted in and during the pendency of the proceeding, so that this Court, with all of the interested parties before it and before approving and thereafter confirming the Plan and making the Final Order, could have determined whether any claim, such as that now attempted to

be asserted, existed and, if it did exist, what its priority should be and whether, and how, it should share in the distributable assets in the hands of the Court. Petitioner failed and neglected to file said claim, to assert the same or in any way to make the same known. Having failed to file or assert its alleged claim prior to the Final Order, Petitioner may not now have the Final Order modified so as to permit it now to assert said claim.

Wherefore, the Company prays that Petitioner take nothing by its petition, that said petition be dismissed and that the Company have such other and further relief as may be appropriate in the premises.

/s/ ALLAN P. MATTHEW,
ROBERT L. LIPMAN,

/s/ BURNHAM ENERSON,

Attorneys for the Western Pacific Railroad
Company.

Of Counsel:

McCUTCHEON, THOMAS, MATTHEW,
GRIFFITHS & GREENE.

State of California,

City and County of San Francisco—ss.

Charles Elsey, being first duly sworn, deposes and says:

That he is the President of The Western Pacific Railroad Company. That he has read the foregoing Answer and Return of The Western Pacific Railroad Company to Petition of The Western Pacific Railroad Corporation for Clarification or Modifi-

cation of the Injunctive Provisions of the Final Order Herein, dated March 28, 1946, and that the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and as to those matters that he believes to be true.

s/ CHARLES ELSEY.

Subscribed and sworn to before me this 13th day of September, 1948.

(Seal) /s/ NANCY EVERETT,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 3, 1950.

[Endorsed]: Filed Sept. 15, 1948.

EXHIBIT G

In the District Court of the United States for the
Northern District of California,
Southern Division
No. 26333-H

The Western Pacific Railroad Corporation,
vs. Plaintiff,

Sacramento Northern Railway, The Western Pacific
Railroad Company and American Trust Com-
pany of San Francisco, as Trustees under an
Indenture executed by Sacramento Northern
Railroad as of July 1, 1918, Defendants.

NOTICE OF DISMISSAL

To the Defendants herein and to their Attorneys:

Please take notice that in accordance with the
provisions of that certain order adjudging the
Western Pacific Railroad Corporation guilty of
contempt, made on March 19, 1947, and filed March
20, 1947 in an action numbered 26591-S in the
above entitled Court, and in conformity to para-
graph 3 of said order, the above entitled action is
hereby dismissed as to the defendant The Western
Pacific Railroad Company.

Dated: April 18, 1947.

LEROY R. GOODRICH,
F. C. NICODEMUS, JR.,
A. PERRY OSBORN,

Attorneys for The Western Pacific Railroad Cor-
poration.

By LEROY R. GOODRICH.

[Endorsed]: Filed Sept. 15, 1948.



LEROY R. GOODRICH
Bank of America Building
Oakland 12, California
Attorney for The Western Pacific
Railroad Corporation

FRANK C. NICODEMUS, JR.
44 Wall Street
New York 5, New York

A. PERRY OSBORN
20 Exchange Place
New York 5, New York
Of Counsel

IN THE

District Court of the United States

FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 26591-S

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY,
Debtor.

MEMORANDUM OF THE WESTERN PACIFIC RAIL- ROAD CORPORATION IN SUPPORT OF PETITION FOR CLARIFICATION OR MODIFICATION OF THE INJUNCTIVE PROVISIONS OF THE FINAL ORDER HEREIN DATED MARCH 28, 1946

The objective of the Petition of The Western Pacific Railroad Corporation for clarification or modification of the injunctive provisions of the Final Order entered by

this Court on March 28, 1946, is to put the Petitioner in a position to file under protection of a Court Order an amended Bill of Complaint in a proceeding pending numbered 26333-H on the Docket of this Court originally brought by the Petitioner against Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, in respect of an indebtedness due the Petitioner from the defendant Sacramento Northern Railway amounting with interest to June 30, 1945, to \$1,441,390.55.

A form of Order which the Petitioner deems appropriate is made a part hereof marked Attachment A.

The form of amended Bill of Complaint under which it is proposed again to bring into the action as a party defendant The Western Pacific Railroad Company (heretofore dismissed under conditions fully developed in this Memorandum), is made a part hereof marked Attachment B.

The Western Pacific Railroad Company has filed in opposition an "Answer and Return" setting up six *Defenses* which appear in the main to relate to the merits of the controversy ultimately to be determined. That stage, however, has not yet been reached.

We think a brief explanation of what has already happened and what the Petitioner now proposes to do will satisfy the Court that the Petitioner is reasonably entitled to ask its aid and protection in the prosecution of its claim against both the Sacramento Northern Railway and its parent The Western Pacific Railroad Company.

On August 30, 1946, after the filing of the original Bill of Complaint in number 26333-H in which The Western Pacific Railroad Company was named as a party Defendant Judge ST. SURE on application of The Western Pacific Rail-

road Company issued an Order directing the present Petitioner to show cause why it should not be adjudged in contempt of Court. The Petitioner filed its Return to the Order to Show Cause and the matter was submitted to Judge ST. SURE and had been held by him undecided for many months when he was stricken with the illness which resulted in his retirement.

On March 19, 1947, an Order was signed by Judge ST. SURE at his residence and was sent over to the Clerk of the Court for filing which adjudged the Petitioner to be in contempt; imposed as a penalty that the Petitioner pay to The Western Pacific Railroad Company "the full amount of all costs, counsel fees and damages paid, incurred or suffered by The Western Pacific Railroad Company on account of the commencing and maintaining of said action No. 26333-H against it" and granted to the Petitioner the privilege of purging itself of such contempt by dismissing within fifteen days as against The Western Pacific Railroad Company its said action No. 26333-H.

From the recitals in the Order signed by Judge ST. SURE on March 19, 1947, it seemed obvious to Petitioner's counsel that he had misconceived the nature of the cause of action set forth in the Bill of Complaint in Action No. 26333-H, which had been carefully limited to be confined within the exceptive provisions of the Order of March 28, 1946, permitting commencement and maintenance of a suit against The Western Pacific Railroad Company on *any* claim entitled to priority over its pre-reorganization mortgages.

In this situation any one of three procedures was open to Petitioner—(a) a Petition for Rehearing before Judge ST. SURE; (b) an appeal to the Circuit Court of Appeals; or (c) a dismissal of the Bill of Complaint as against The Western Pacific Railroad Company to be followed by the filing of an amended Bill of Complaint under the protection of an Order of Court.

Counsel for the Petitioner were confident that Judge ST. SURE would recognize that he had misconceived the case and would promptly set aside the Order on a Petition for Rehearing but that course was ruled out by his illness.

There was a patent hazard in an appeal to the Circuit Court of Appeals. If such an appeal had been taken and lost the Petitioner might become liable for heavy counsel fees to be charged by counsel for The Western Pacific Railroad Company on the theory that they had rid it of a liability of \$1,441,390.55.

So the Petitioner determined to dismiss the original Bill of Complaint as against The Western Pacific Railroad Company and thereafter to apply (as it is now doing) for a clarifying or modifying Order under the protection of which it could reimplead The Western Pacific Railroad Company under a new Bill of Complaint revised so as to be more clearly and definitely confined within limits of the exceptive provisions of the Order of March 28, 1946, and amended by superadding a derivative action in favor of the Sacramento Northern Railway and against The Western Pacific Railroad Company which if successful would put Sacramento Northern Railway in funds necessary to discharge its indebtedness due the Petitioner.

It is the Petitioner's belief that the commencement and maintenance of such a suit would violate neither the spirit nor the letter of the injunctive provisions of the Order of March 28, 1946, but even if it should be found to run counter in some detail to the letter of such provisions that the Court in furtherance of justice would favorably consider a motion for an order limiting or suspending its application.

We pass over at this point without discussion the suggestion of counsel for The Western Pacific Railroad Company that this Court has lost control over the Order of March 28, 1946, and has no power to clarify it or limit its application. As an incident to its power to enforce the

injunction we contend that there is inherent power to limit its application.

For obvious reasons we think that the Court will be interested in knowing what the suit is which the plaintiff proposes to maintain and to prosecute and in which it intends to re-implead The Western Pacific Railroad Company.

First of all it should be emphasized that there is an undisputed and highly meritorious claim against the Sacramento Northern Railway for \$1,441,390.55.

The Sacramento Northern Railway is a wholly-owned subsidiary of The Western Pacific Railroad Company and it (said Railroad Company) asserts that the claim is barred by the Statute of Limitations of the State of California. The precise Statute upon which The Western Pacific Railroad Company relies is not cited but we assume that reliance is placed upon Section 337 of the Code of Civil Procedure of California which bars suit upon an open book account after four years. In order to determine whether limitation is a good defense it is necessary to give very briefly the history of the indebtedness.

The Petition alleges:

“In or about 1928 the Sacramento Northern Railway acquired lines of railroad from or of the San Francisco-Sacramento Railroad Company for the purpose of extending the traffic producing territories from which its parent, said Western Pacific Railroad Company would derive additional long haul revenue producing traffic. By this means additional areas were opened up to said Western Pacific Railroad Company in Alameda, Contra Costa, Solano, Yolo and Sacramento Counties, at a total cost of \$1,675,000 of which the principal indebtedness due the Petitioner from Sacramento Northern Railway is or represents a part.”

At the outset it is to be noted therefore that the indebtedness which the Petitioner is seeking to collect represents

the unpaid purchase price in corporate title of valuable traffic producing property which has been continuously in the possession of, and has been operated for the benefit and enrichment of (a) the pre-reorganization The Western Pacific Railroad Company; (b) the Section 77 Trustees; and (c) the post-reorganization Railroad Company but for which the Petitioner has not been paid.

This being true the case is controlled in all of its fundamental features by the decision of the Supreme Court of California in the case of *Booth v. Hoskins*, 75 Cal. 271.

This was a suit brought in Placer County, California, to quiet plaintiff's alleged title to land. The defendant answered alleging a valid conveyance of the property to him by the plaintiff for a consideration of \$408 and prayed that his title be quieted against the wrongful claim of the plaintiff. The plaintiff answered the cross-complaint admitting conveyance of the land to the defendant by quit claim deed but rejoined that the conveyance was intended only as a mortgage to secure payment of \$408 advanced to him by the defendant and then further alleged that the defendant's claim against him for the said sum of \$408 (with interest accruals bringing the total up to slightly less than \$1,000) was barred by Sections 337 and 339 of the Code of Civil Procedure.

The Court held:

(a) that the quit claim deed was in fact given as security for the debt and was not an absolute or unconditional conveyance;

(b) that the debt which it was given to secure was barred by Sections 337 and 339 of the Code of Civil Procedure and that no writing conforming to Section 360 had been given to toll limitations.

The Court then held, and the Supreme Court of California affirmed the holding, that equity would not give the

plaintiff any relief unless and until he had paid the barred debt.

The following is from the Opinion of the Supreme Court:

“The whole case shows that Booth justly owed the defendant all the money claimed by him. It was by the use of the money loaned by defendant that Booth acquired the title to his property now of large value. Common honesty requires a debtor to pay his just debts if he is able to do so, and the Courts, when called upon, always enforce such payments if they can. The fact that a debt is barred by the Statute of Limitations in no way releases the debtor from his moral obligation to pay it. Moreover, one of the maxims which courts of equity should always act upon is, as suggested by the Court below, that he who seeks equity must do equity. In accordance with this maxim we think the plaintiff should be denied any affirmative relief until the money justly due to the defendant is paid.”

This decision is of importance in this case not so much in its relation to the question of limitations (because we shall show that adequate writings conforming to Section 360 of the California Code of Civil Procedure have been given to toll limitations) but is highly significant in its direct bearing on the moral issues in this case. If the re-organized The Western Pacific Railroad Company is to be allowed to retain proprietorship of Sacramento Northern Railway to swell its own revenues and improve its own earning power we think as the Court here says that “common honesty” requires that it make good the unpaid purchase price. Certainly this Court would hesitate to allow an injunction granted by it for a perfectly proper purpose to be used to frustrate and defeat what the Supreme Court of California deems to be “common honesty”.

It is also important for this Court to understand the form of The Western Pacific Railroad Company’s ownership of the Sacramento Northern Railway.

At the time the indebtedness was created to aid the purchase of the properties of the San Francisco-Sacramento Railroad Company by the Sacramento Northern Railway all of the capital stock and all but a negligible amount of the outstanding bonds of the Sacramento Northern Railway were owned by the pre-reorganization The Western Pacific Railroad Company. To be specific there were 10,000 shares of Common Stock (\$1,000,000) and \$5,213,475 of First Mortgage Bonds. Subsequently money was advanced by the parent to the subsidiary amounting as of December 31, 1945 to \$4,524,744. These securities were revested in the reorganized The Western Pacific Railroad Company by Order of this Court entered November 27, 1944 but are obviously held by the reorganized The Western Pacific Railroad Company subject to all of the infirmities and equities that could have been asserted against the pre-reorganized Railroad Company. That is to say—the reorganized The Western Pacific Railroad Company took these securities in precisely the condition and subject to all equities of third parties under which they were held by the pre-reorganization Railroad Company. The Court could not well revest in the reorganized Western Pacific Railroad Company a better and stronger title than that of the pre-reorganized Company. To do so would defy the natural law that a stream does not rise higher than its source.

So we respectfully urge that the Petitioner without violating the intent and purposes of the injunctive provisions of the Order of March 28, 1946, is entitled to bring any action that could have been brought against the pre-organized The Western Pacific Railroad Company respecting the Sacramento Northern Railway; and if such a suit is prohibited by the letter of the injunctive provision of the Order of March 28, 1946, we believe that it is not only within the power of this Court but will be the wish of this Court to modify the Order to conform to its true intent.

First as to the enforceability of the indebtedness due the Petitioner from the Sacramento Northern Railway which the Western Pacific Railroad Company alleges is barred by limitations:

On or about February 14, 1933, Sacramento Northern Railway filed with The Railroad Credit Corporation to induce it to make a loan to the pre-organized The Western Pacific Railroad Company a certificate verified by its Auditor certifying that: "There is now owing to The Western Pacific Railroad Corporation from Sacramento Northern Railway the sum of \$856,260 in an open book account." From time to time thereafter the Sacramento Northern Railway filed or caused to be filed in each year up to and including at least the year 1944 with the Interstate Commerce and with the federal Commissioner of Internal Revenue properly authenticated financial statements in which said indebtedness was shown as subsisting indebtedness and upon which interest accruals were made in favor of the Petitioner.

For these reasons, among others, the Petitioner maintains that the debt is valid and subsisting, is not barred by limitation, and that the Petitioner is entitled to a peremptory decree for the full debt with interest which amounted as of June 30, 1945 to \$1,444,390.55.

Such a judgment will, however, be uncollectible unless payment can be obtained through a sale of the railroad and property of Sacramento Northern Railway or through the derivative action in favor of Sacramento Northern Railway against The Western Pacific Railroad Company.

The Petitioner believes that it can collect and should be permitted by this Court to collect its debt from The Western Pacific Railroad Company by one or the other of these two procedures in their reverse order—*first*, by super-adding to the present Bill of Complaint in Action No. 26333-H a derivative cause of action as outlined in the

Petition involving a retroactive adjustment of divisions of revenues interchanged between Sacramento Northern Railway and The Western Pacific Railroad Company and its Trustee and *second*, by a sale of the property of the Sacramento Northern Railway pursuant to a decree which under the Deep Rock doctrine would subordinate to the Petitioner's claim for \$1,441,309.55 *all* indebtedness of the Sacramento Northern Railway held by The Western Pacific Railroad Company.

By one or the other of these two procedures the Petitioner hopes to coerce The Western Pacific Railroad Company into doing what the Supreme Court of California says is required by the dictates of common honesty but the Petitioner feels that it ought not unnecessarily to disrupt the present operation of Sacramento Northern Railway as an integral part of the Western Pacific Railroad System and hence should defer action for a receivership and sale unless and until it has exhausted the other remedy without securing a full recovery.

We do not think we are called upon now to discuss the merits of either of these propositions. The effort of our adversaries to do just this is one of the grounds of our own criticism of their "Answer and Return." All that we think we are called on to do in order to make a case for the preliminary relief here sought is to show a *bona fide* claim and a probable cause of action. Although we are fighting against strongly entrenched adversaries we do think that we have shown a *bona fide* claim and to say the very least a probable cause of action.

A few comments on the "Answer and Return" of The Western Pacific Railroad Company may be helpful.

(a) *Limitations*. Little more need be said on limitations. We think that adequate writings are available to show effective recognition of the debt within the four year period. But even if the debt is barred against Sacramento Northern Railway it is a good claim against proceeds of

sale of the properties of the Sacramento Northern Railway in priority to the claims thereagainst of The Western Pacific Railroad Company unless we misinterpret *Booth v. Hoskins*.

(b) *Res Adjudicata*. The Petition pre-supposes that the injunctive provisions of the Order of March 28, 1946, were broad enough to bar the prosecution as against The Western Pacific Railroad Company of the suit as framed in the original Bill of Complaint in No. 26333-H. But that does not bar an application to the Court for a revision of the terms of the injunction to prevent an injustice. Nor does the doctrine of *res adjudicata* apply if there is an amended Bill of Complaint filed of a different character. The Court will note that there appears in the proposed amended Bill of Complaint the following paragraph not included in the original Bill of Complaint:

“Anything herein to the contrary notwithstanding this amended Bill of Complaint to the extent that it seeks a money judgment or decree in favor of Sacramento Northern Railway and against The Western Pacific Railroad Company in respect of the period prior to December 31, 1944 is hereby limited to such amounts, if any, as are found due from The Western Pacific Railroad Company to Sacramento Northern Railway upon a judicial settlement of their inter-line accounts for the period prior to August 2, 1935, and are entitled to priority over the then existing mortgage indebtedness of the defendant, The Western Pacific Railroad Company, and to such amounts, if any, as are found to be due upon a judicial settlement of the inter-line accounts of Sacramento Northern Railway and the Trustees for the period August 2, 1935 to December 31, 1944, and payment of which is a liability of the defendant, The Western Pacific Railroad Company, under the Assumption Agreement executed pursuant to the Order of this Court dated November 27, 1944.”

(c) *Inter-Line Accounts*. We are in complete disagreement with what is said by counsel for The Western Pacific

Railroad Company on the subject of inter-line accounts and inter-line settlements. There has been no judicial settlement. The accounts are open for audit and there is no question of limitations. Under the present Rule 170 prescribed by the Accounting Division of the Association of American Railroads all inter-line accounts are open for voluntary audit for a period of three years, the period having been reduced from six years to three years by reason of man shortage occasioned by the war; but there is no limitation at all upon the right of any connecting carrier to a judicial settlement of inter-line accounts back to the last preceding settlement. To say that the inter-line accounts between the Sacramento Northern Railway and The Western Pacific Railroad Company or its Trustees are settled and closed is contrary to the facts as we understand them. The whole subject of the auditing and settlement of inter-line carrier accounts was rather fully developed and its peculiarities explained in evidence taken by the Committee of Interstate Commerce (Wheeler-Truman Sub-Committee) pursuant to Senate Resolution 71 (74th Congress) pages 9944-9964.

(d) *Alleged failure first to secure a judgment.* The Western Pacific Railroad Company asserts that the Petitioner has no right to bring a derivative action on behalf of Sacramento Northern Railway because it has not yet obtained a judgment. We admit that to be the general rule but like all general rules it should not be applied to cases to which the reasons underlying it have no relevancy.

There being no defense other than Limitations (which may be disposed of summarily) to the Petitioner's claim in the amount of \$1,441,390.55 an immediate judgment or decree is available to the Petitioner under Rule 56 of the Rules of Civil Procedure. Since equity regards as done that which ought to be done we think it proper for the Court to assume for the purposes of the present Petition that the Petitioner has the status of a judgment-creditor.

(e) *Alleged lack of equity.* As the last of its six defenses The Western Pacific Railroad Company avers that the Petitioner's Petition is without equity and should be denied even if the Court has jurisdiction (which is questioned in the fifth defense) to limit or relax the injunctive provisions of its final Order of March 28, 1946.

The point is urged that such action by the Court would disturb the reorganization upon the faith of which the new securities have been taken and sold and for a long period of time have acquired a standing in financial and investment circles on the faith of the Court's final Order of March 28, 1946.

The fact is overlooked, however, that the reorganized The Western Pacific Railroad Company did not acquire under the reorganization title to the properties of the Sacramento Northern Railway but only the capital stock and certain of the indebtedness of the Sacramento Northern Railway and there was no representation, express or implied, that these securities would enjoy a different status in the ownership of the reorganized The Western Pacific Railroad Company than in the ownership of the pre-reorganization The Western Pacific Railroad Company. The reorganized The Western Pacific Railroad Company took these securities subject to all equities that might have been asserted thereagainst in the ownership of the pre-reorganization The Western Pacific Railroad Company, and we respectfully insist that the Bankruptcy Court did not have power to enter and did not attempt to enter an injunction that would impair such equities or would interdict the joining of The Western Pacific Railroad Company as a party defendant to any action against Sacramento Northern Railway in respect of such equities to which The Western Pacific Railroad Company may be deemed a necessary or proper party. It is to be borne in mind that the Sacramento Northern Railway was not a

party to the Bankruptcy proceeding and that the Bankruptcy Court had no jurisdiction to make any determination respecting the Status of the indebtedness due from it to the Petitioner. (Note in this connection what is said by Mr. Justice REED under "Accommodation Collateral" in his opinion in this proceeding—*Ecker v. Western Pacific Railroad Corporation*, 318 U. S. 448.)

All of which is respectfully submitted.

LERoy R. GOODRICH,
Bank of America Building,
Oakland 12, California,
*Attorney for The Western Pacific
Railroad Corporation.*

FRANK C. NICODEMUS, JR.,
A. PERRY OSBORN,
Of Counsel.

Attachment A

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 26591-S

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY,
Debtor.

SUPPLEMENT TO FINAL ORDER

The Petition filed herein September 30, 1947, by The Western Pacific Railroad Corporation for a supplemental Order clarifying or modifying the injunctive provisions of the Final Order herein dated March 28, 1946, came on for hearing under the jurisdiction reserved by the Court under said Final Order and general equity jurisdiction conferred by the National Bankruptcy Act and after hearing has been submitted—

The Court finds and concludes:

FIRST: That the Petitioner is a creditor of Sacramento Northern Railway in an amount as shown by the General Balance Sheet of said Railway at June 30, 1945, of \$1,441,390.55.

Attachment A

SECOND: The Sacramento Northern Railway is not now and never has been a party to the Bankruptcy proceeding and the Petitioner has filed in this Court and there is now pending herein an independent suit against Sacramento Northern Railway and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, to enforce payment of said indebtedness against Sacramento Northern Railway and its property. In the original Bill of Complaint The Western Pacific Railroad Company was named as a party defendant but was dismissed as such defendant by the Petitioner following the entry of an Order adjudging that the filing of said Bill of Complaint against The Western Pacific Railroad Company violated the injunctive provisions of said Final Order.

THIRD: The Petitioner proposes now to institute a new suit or to reform the pending suit by re-impleading The Western Pacific Railroad Company under a new or amended complaint setting forth in the right of Sacramento Northern Railway, a derivative cause of action against The Western Pacific Railroad Company for a judicial settlement of interline accounts under which substantial recoveries may be obtained by Sacramento Northern Railway to apply in satisfaction of its indebtedness due the Petitioner.

FOURTH: The Petitioner represents that the new or amended Bill of Complaint will set forth valid and subsisting causes of action against Sacramento Northern Railway and The Western Pacific Railroad Company which violate neither the spirit nor the letter of the injunctive provisions of said Final Order but even if within the letter are not within the intent of said Final Order and that a supplement Order limiting its application would be in furtherance of justice.

Attachment A

FIFTH: Substantial issues of law and fact which were not before this Court in this Bankruptcy proceeding are tendered by the Petitioner which may be meritorious and even though within the letter of the injunctive provisions of the Final Order may not be within the spirit and intent and ought not to be disposed of summarily.

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED and DECREED:

1. That notwithstanding the injunctive provisions of the Final Order dated March 28, 1946, authority is hereby granted to the Petitioner (and if and to the extent necessary said provisions are hereby modified) to implead The Western Pacific Railroad Company as an additional party defendant in the action now pending in this Court numbered 26333-H on the Docket and to file in said action and serve upon The Western Pacific Railroad Company such amended Bill of Complaint as it may be advised by counsel is necessary and proper in order to set forth the causes of action outlined in the petition.

2. That the authority hereby granted is subject to the condition that it is without prejudice to the positions of either The Western Pacific Railroad Company or the Petitioner if said Final Order or any earlier order or decree of this Court in this Bankruptcy proceeding is pleaded by said Railway Company in bar of the prosecution of any action or actions set forth in such amended Bill of Complaint.

Dated, _____, 1948.

.....
District Judge



Attachment B

LEROY R. GOODRICH
Attorney for Plaintiff
Bank of America Building,
Oakland 12, California

F. C. NICODEMUS, JR.
A. PERRY OSBORN
Of Counsel

IN THE
District Court of the United States

FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

26333-H

THE WESTERN PACIFIC RAILROAD CORPORATION,
Plaintiff,

vs.

SACRAMENTO NORTHERN RAILWAY, THE WESTERN PACIFIC
RAILROAD COMPANY and AMERICAN TRUST COMPANY OF
SAN FRANCISCO, as Trustee under an Indenture exe-
cuted by Sacramento Northern Railroad as of July 1,
1918,

Defendants.

AMENDED BILL OF COMPLAINT

IN THE
District Court of the United States

FOR THE NORTHERN DISTRICT OF CALIFORNIA,
 SOUTHERN DIVISION

26333-H

THE WESTERN PACIFIC RAILROAD CORPORATION,
Plaintiff,

vs.

SACRAMENTO NORTHERN RAILWAY, THE WESTERN PACIFIC
 RAILROAD COMPANY and AMERICAN TRUST COMPANY OF
 SAN FRANCISCO, as Trustee under an Indenture exe-
 cuted by Sacramento Northern Railroad as of July 1,
 1918,

Defendants.

AMENDED BILL OF COMPLAINT

The Western Pacific Railroad Corporation, plaintiff
 herein, complaining of the above named defendants, re-
 spectfully shows:

I

That the plaintiff is a domestic corporation created by
 and existing under the laws of the State of Delaware.

II

That each of the defendants is a domestic corporation
 created by and existing under the laws of the State of
 California and is an inhabitant of the Northern District
 of California.

Attachment B

III

That this is a civil action in equity between citizens of different States and to the extent that it seeks relief in favor of Sacramento Northern Railway against the defendant The Western Pacific Railroad Company it is a derivative action brought by the plaintiff as a creditor of Sacramento Northern Railway on behalf of itself and other creditors similarly situated; and that the amount in controversy exclusive of interest and costs exceeds the sum of \$5,000.

IV

That in the year 1928 the plaintiff advanced to the defendant, Sacramento Northern Railway, sums of money aggregating \$877,380, of which \$21,120 was repaid January 31, 1929, leaving a balance due on said date of \$856,260, and in the period subsequent to said advances the defendant, Sacramento Northern Railway, has accrued interest thereon to a total of \$585,130.55, and said amounts aggregating \$1,441,390.55 are shown as indebtedness due the plaintiff on the General Balance Sheets of the defendant, Sacramento Northern Railway, as of June 30, 1945. That for a number of years within a period of four years next preceding the institution of this suit the defendant, Sacramento Northern Railway, has furnished to the plaintiff duly authenticated Balance Sheets signed by properly authorized accounting officers showing such indebtedness for principal and appropriate amounts for accrued interest thereon as valid and subsisting indebtedness due and owing from said defendant to the plaintiff and has authorized the plaintiff to file each such Balance Sheet on its behalf with Commissioner of Internal Revenue as the basis for the determination of federal taxes.

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V

That the aforesaid indebtedness due to the plaintiff by the defendant, Sacramento Northern Railway, in the amount of \$1,441,390.55 including interest to June 30, 1945 but not interest accruals thereafter was created and arose in the manner hereinafter stated and is entitled in equity to a first and paramount lien on the railways, property and assets of said defendant, Sacramento Northern Railway, and such indebtedness is entitled to be paid in full prior to any payment of or on account of indebtedness, if any, due and owing to the defendant, The Western Pacific Railroad Company, by the defendant, Sacramento Northern Railway.

VI

That the defendant, The Western Pacific Railroad Company, now owns and operates, and at all times mentioned in this Bill of Complaint has owned and operated, a system of Railways in the States of California, Nevada and Utah, with termini at San Francisco, Oakland and Sacramento in the State of California, and Salt Lake City in the State of Utah. That during part of the period 1935 to 1945 its operations were conducted by Trustees appointed by this Court pursuant to provisions of The National Bankruptcy Act. That the properties of the defendant, The Western Pacific Railroad Company, were released to it by the said Trustees as of December 31, 1944 for corporate operation and such operation still continues. That prior to November 22, 1943, all of the capital stock of the defendant, The Western Pacific Railroad Company, was held by the plaintiff which had issued shares of its own stock thereagainst. That this arrangement was made for the reason that under certain provisions in the corporate law of California, since

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repealed, there was a problem of stockholders' liability. That subsequent to November 22, 1943, but prior to December 31, 1944, the capital stock of the defendant, The Western Pacific Railroad Company, theretofore owned by the plaintiff, was delivered to the Reorganization Committee of the defendant, The Western Pacific Railroad Company, to facilitate its reorganization which was consummated as of said last mentioned date.

VII

That in 1925, the defendant, The Western Pacific Railroad Company, acquired at a cost of approximately \$4,500,000 all of the capital stock and mortgage indebtedness of the Sacramento Northern Railway, one of the defendants herein, being 10,000 shares of common stock (\$100 par value) and \$5,224,373 mortgage bonds, which securities were purchased by the defendant, The Western Pacific Railroad Company, from the plaintiff and which securities the plaintiff at the request of said defendant, The Western Pacific Railroad Company, had acquired and held until such time as the defendant, The Western Pacific Railroad Company, could obtain from the Interstate Commerce Commission the necessary authority under the Interstate Commerce Act to control the defendant, Sacramento Northern Railway. That the interim ownership or control of said Sacramento Northern Railway by the plaintiff was an arrangement entered into at the request and for the convenience of the defendant, The Western Pacific Railroad Company, which desired to own and control said Sacramento Northern Railway for the purpose of securing access to valuable traffic in interchange originating in the Sacramento Valley. That the defendant, Sacramento Northern Railway, then owned and has continued to own

Attachment B

and operate an interurban electric railway engaged in transporting both passengers and freight located in the rich traffic producing territory of the Sacramento Valley extending from Sacramento to Chico, with branches to Oroville, Colusa, and Woodland, and a detached line running southwesterly from Vacaville. That authority has been granted to construct additional lines including a line approximately 16 miles in length extending southerly from a connection with the line of the San Francisco-Sacramento Railroad Company, hereinafter mentioned, at a point 7 or 8 miles south of Sacramento. That it is stated in the Report of the Interstate Commerce Commission authorizing the defendant, The Western Pacific Railroad Company, to acquire control of the defendant, Sacramento Northern Railway:

“As the Western Pacific will hold over 99% of the Railroad Company's Bonds, which constitute its funded debt, the value of the properties to the Western Pacific from the standpoint of earnings will be measured by the Railroad Company's gross income less miscellaneous deductions therefrom. Gross income so reduced has averaged \$292,780.43 for the period given and was \$168,335.63 in 1924. Besides the direct return which the record indicates the Western Pacific will receive as owner of the securities of the Railroad and the Railway Companies, it will also receive income because of additional traffic which will be delivered to it by the Railway Company and on which it will get its long haul to Salt Lake.”

That the plaintiff for further factual detail hereby refers to the official Report of the Interstate Commerce Commission from which the foregoing is quoted and which appears in 99 Interstate Commerce Commission Report at page 382 under title: “Finance Docket No. 1881—Proposed Control of Sacramento Northern By Western Pacific R. R.”

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That the defendant, The Western Pacific Railroad Company, has duly reimbursed the plaintiff for all amounts provided by it prior to July 8, 1925 in the acquisition of control for its account of the defendant, Sacramento Northern Railway.

VIII

That the acquisition by the defendant, The Western Pacific Railroad Company, of control of the defendant, Sacramento Northern Railway, had proved so advantageous and so profitable to the defendant, The Western Pacific Railroad Company, is the period July 8, 1925 to July 1, 1928, that it determined at or before said last mentioned date to broaden the enterprise and extend feeder lines further into the fertile areas of the Sacramento Valley by acquiring through its subsidiary the defendant, Sacramento Valley Railway, the lines of railway and other properties of the San Francisco-Sacramento Railroad Company, described in the Report of the Interstate Commerce Commission hereinafter mentioned as follows:

“(a) Extending from Oakland in a general easterly and northeasterly direction to Mallard, thence by barge and ferry across Suisun Bay, and continuing in a northeasterly direction to Sacramento; (b) from West Pittsburgh in an easterly direction to and through the city of Pittsburg; and (c) a line of railroad located on M Street in the city of Sacramento. The total mileage of main and branch line track to be acquired is 87.08 miles, in Alameda, Contra Costa, Solano, Yolo, and Sacramento Counties, Calif.”

That again, as in the case of the acquisition of control of the defendant, Sacramento Northern Railway, the plain-

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tiff was requested to advance the funds necessary to secure control in the interim in which application for control by the defendant, The Western Pacific Railroad Company, was pending in the Interstate Commerce Commission. That to this end advances were made by the plaintiff which ultimately became part of the purchase price of the properties of the San Francisco-Sacramento Railroad Company which were acquired at a total cost of \$1,675,000 as of January 1, 1929 by the defendant, Sacramento Northern Railway, pursuant to authorization of the Interstate Commerce Commission granted October 15, 1928. That the plaintiff for further factual details hereby refers to the official Report of the Interstate Commerce Commission relating to such authorization which appears in 145 Interstate Commerce Commission Report, at page 533, under title: "Finance Docket No. 7060—Acquisition by Sacramento Northern Railway of Properties of San Francisco-Sacramento Railroad Company." That except the payment of \$21,120 made January 31, 1929, for which credit has been given, neither the defendant, The Western Pacific Railroad Company, nor its subsidiary, the defendant, Sacramento Northern Railway, has repaid to the plaintiff any part of the principal sum advanced by it to the defendant, Sacramento Northern Railway, and has paid to the plaintiff no part of the interest thereon regularly credited to the plaintiff on the books of the defendant, Sacramento Northern Railway, and the whole amount thereof shown on the books of the defendant, Sacramento Northern Railway, in the amount of \$1,441,390 as of June 30, 1945, is due and owing to the plaintiff and for reasons hereinafter more fully stated is a first and paramount equitable lien and charge (a) upon the properties and assets of the defendant, Sacramento Northern Railway, and (b) upon the revenues derived by the defendant, The Western Pacific Railroad Company, from traffic originating on the lines or at the terminals of the

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defendant, Sacramento Northern Railway to the extent that the plaintiff's claim against such revenues is entitled to priority over the mortgages of the defendant, The Western Pacific Railroad Company which have been released under the Plan of Reorganization and Orders of this Court in the reorganization proceeding hereinbefore referred to. That the principal amount of said debt so due and owing to the plaintiff represents the unpaid balance of the purchase price of properties purchased by and now owned by the defendant, Sacramento Northern Railway, and through it by its proprietor, the defendant, The Western Pacific Railroad Company, and unless the plaintiff is accorded the preferences and priority and the equitable liens herein prayed the said defendants will be unduly enriched to that extent contrary to the cardinal principles of equity and the obligations of good conscience.

IX

That the priority and preferential status of the plaintiff's claim as an equitable lien and charge upon the properties and revenues of the defendants, Sacramento Northern Railway and The Western Pacific Railroad Company, arise by operation of fundamental legal and equitable principles as applied to the facts hereinbefore alleged and hereinafter more fully developed and amplified:

It is a deep rooted principle of law of private property that one may deal with one's own as one will but shall not be suffered to do so in a manner that will adversely affect the property rights of others. This doctrine comes into play in corporate law as governing and limiting the right of a parent corporation to manage and deal with a wholly or partially owned subsidiary company. If the subsidiary is wholly owned and has no creditors whose interests might

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be affected adversely the power and authority of the parent over the subsidiary is absolute but if the ownership is not complete or if there are unpaid creditors of the subsidiary the power and authority of the parent is curtailed to the extent necessary to protect the outstanding interest. It is an accepted, broad, equitable principle that corporate autonomy will not be upheld to permit fraud or injustice. This principle is particularly applicable in dealing with controlled or wholly owned subsidiary corporations which are the instrumentalities of the controlling corporation. The philosophy of this rule sometimes referred to as the "Deep Rock Doctrine" is developed in the Opinion written by Mr. Justice DOUGLAS for the Supreme Court in *Pepper v. Litton*, 308 U. S. 295, interpreting the earlier case of *Taylor v. Standard Gas & Electric Company*, 306 U. S. 307 and is elaborated in an Article by Professor Wormser in 12 Columbia Law Review entitled "Piercing the Veil of Corporate Entity". From the inception of the ownership and control by the defendant, The Western Pacific Railroad Company, of the defendant, Sacramento Northern Railway, it has exercised all the rights and privileges of complete proprietorship, and has utilized the lines and facilities of its subsidiaries (as it was proper it should do and as it had formally advised the Interstate Commerce Commission it intended to do) to develop and secure long haul traffic for its own rails between the Sacramento Valley, in California, and Salt Lake City, in the State of Utah. In the early years of its proprietorship the properties of the defendant, Sacramento Northern Railway, yielded a substantial return upon the capital invested therein. The property was self-sustaining and would have continued to be so if its earning power had not been curtailed by its merger in 1929 with the properties of the San Francisco-Sacramento Railroad Company which was purchased at a cost of \$1,675,000 at a time when it had ceased to be self-sustaining, was operat-

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ing at a deficit and was threatened with proceedings in abandonment. The combination of these properties produced an enlarged enterprise which was a valuable adjunct to the defendant, The Western Pacific Railroad Company, but which never earned for itself and its creditors any return upon the capital invested therein. There was no effort on the part of the defendant, The Western Pacific Railroad Company, to so manage the combined properties as to develop a self-sustaining earning power and there was no reason for such effort so long as it recognized the prior and paramount equity of the plaintiff's claim for repayment with lawful interest of its advances to the defendant, Sacramento Northern Railway. In railway economics the defendant, Sacramento Northern Railway, was in a special category known as "an originating carrier." Such a carrier gathers and distributes traffic which moves only a short distance over its own rails and does not produce sufficient revenue for the short line haul to pay the cost of the service. To compensate it for its service and keep it in business it is given by connecting lines a higher percentage of the revenue than a division on a mileage basis which is known as an arbitrary. This varies in amount in relation to the facts of each case. One of the objectives of The Western Pacific Railroad Company in acquiring control of the defendant, Sacramento Northern Railway, in 1925 was to avoid such an arbitrary and permit it to retain, as it subsequently did, all of the revenue derived from its own long haul of traffic originating on the line of the Sacramento Northern Railway. For more than 15 years the defendant, The Western Pacific Railroad Company, has retained all of such revenues without being asked to account to Sacramento Northern Railway for any part thereof so as to provide it with funds for the repayment of the advances made to it by the plaintiff. In such an accounting the defendant, The Western Pacific Railroad Company, as the result of judicial and

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administrative decisions which stem back to the case of *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 665, will not be permitted to apply its over-all operating ratio to the business interchanged with its subsidiary, the defendant, Sacramento Northern Railway, but will be accountable to it for all of the revenue derived from the full line haul except the out-of-pocket operating cost applicable thereto. The exact amount of such revenues is unknown and could only be determined as the result of an intricate accounting but the plaintiff alleges that the amount of such revenues approximates or exceeds \$20,000,000. In the period in which the defendant, The Western Pacific Railroad Company, retained these revenues on traffic delivered to it by the Sacramento Northern Railway it did not credit to the defendant, Sacramento Northern Railway, any interest payments on \$5,227,706 of Bonds of the Sacramento Northern Railroad (predecessor Company Bonds assumed by Sacramento Northern Railway) and did not credit to the defendant, Sacramento Northern Railway, any payment on account of principal or interest on advances which it had made in amounts (some represented by notes, some by open account) aggregating \$9,425,000 but allowed interest claims to back up and accumulate so that as of June 30, 1945 the defendant, The Western Pacific Railroad Company, appeared from the books of account to be a creditor of the defendant, Sacramento Northern Railway, in the amount of \$22,964,324. Although this indebtedness is still carried on such books it has not been treated by the defendant, The Western Pacific Railroad Company, as lawful indebtedness which it could enforce to the detriment of the plaintiff as creditor of the defendant, Sacramento Northern Railway. That this is the position of the defendant, The Western Pacific Railroad Company, is clear from its course of conduct as outlined above and as fortified by its action in causing the valid and unpaid indebtedness of the plaintiff in the

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principal amount of \$856,260 to be pledged with The Railroad Credit Corporation as Accommodation Collateral for a loan obtained by the defendant, The Western Pacific Railroad Company, from The Railroad Credit Corporation without then asserting that it held claims against the defendant, Sacramento Northern Railway, aggregating \$22,964,324 or thereabout, or nearly double the amount of the then total assets of the Sacramento Northern Railway as shown by its books. That said loan has been fully satisfied and The Railroad Credit Corporation fully indemnified out of collateral furnished by The Western Pacific Railroad Company without resort to the Accommodation Collateral. Applying the Deep Rock Doctrine to the debts appearing on the books of the defendant, Sacramento Northern Railway, to (1) the plaintiff, and (2) the defendant, The Western Pacific Railroad Company, there could be little question that the defendant, The Western Pacific Railroad Company, would not be permitted to interpose the book credits of its wholly owned subsidiary, the defendant, Sacramento Northern Railway, as against the debt of the latter to the plaintiff even if such debt had not acquired an independent status as the result of the reorganization consummated as of December 31, 1944. But there can be no question at all on that point now that the plaintiff has acquired an independent status as the result of said reorganization. The unpaid loans of the plaintiff to the defendant, Sacramento Northern Railway, were of value and benefit to it only so long as the inter-corporate relationship existed between it and the defendant, the Western Pacific Railroad Company. When the reorganization of said last mentioned Company was effected by its security holders and the entire stockholdings of the plaintiff in said last named defendant were surrendered its loans to the defendant, Sacramento Northern Railway, and the plaintiff itself acquired each an independent status and the plaintiff stepped into the position of any

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creditor of the Sacramento Northern Railway other than its proprietor, the defendant, The Western Pacific Railroad Company. Any other benefit to the plaintiff as the result of the making of the loans to the Sacramento Northern Railway, thereupon disappeared. On the other hand all benefits which the defendant, The Western Pacific Railroad Company, obtained by the making of the loans to the defendant, Sacramento Northern Railway, for the maintenance of a continuous flow of traffic continued. The creditors of the defendant, The Western Pacific Railroad Company, who succeeded to its ownership in the reorganization accepted this ownership with knowledge that the prior owner, the plaintiff, had loaned money to a wholly owned subsidiary, the Sacramento Northern Railway, and that the creditor making this loan would achieve a wholly independent status upon the effectuation of the reorganization. Equity will not permit the reorganization The Western Pacific Railroad Company to interpose its own alleged credits to its subsidiary in an amount which would render the independent claim of the plaintiff substantially valueless while retaining for itself all of the benefits enjoyed by its continuance of the ownership of the defendant, Sacramento Northern Railway.

X

That the defendant, Sacramento Northern Railway, enlarged in the manner and by the process above outlined has always been operated autonomously although some, if not all, of its organization or personnel are also officers or employees of the defendant, The Western Pacific Railroad Company, and all of the traffic originated and gathered by it except a relatively unimportant part thereof has been delivered by it to said defendant, The Western Pacific Rail-

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road Company, as a connecting carrier in accordance with the usages and practices of the railway industry and with the provisions of the Interstate Commerce Act, all of which require just and equitable rates and fair and equitable divisions thereof between connecting and participating carriers. Such method of operation was pursued by the defendant, The Western Pacific Railroad Company, prior to the appointment in 1935 of Trustees in this proceeding and prior to the institution of this proceeding on August 2, 1935, and was continued by the Trustees appointed herein during the full period of their trusteeship and since their trusteeship ended and the defendant The Western Pacific Railroad Company has been revested with its properties as of December 31, 1944 has been pursued by the defendant, The Western Pacific Railroad Company, but at no time during any of these three periods has there been any audit and judicial settlement of the inter-line accounts between defendant, Sacramento Northern Railway, and defendant, The Western Pacific Railroad Company and/or its Trustees. Under the law and the usages and practices of the railroad industry inter-line accounts are running accounts which are subject to audit at any time without regard to the statute of limitations because, as is expressly provided in California by Section 344 of the Code of Civil Procedure, the time ordinarily runs from the date of the latest entry and new entries occur daily and under a long line of judicial decisions in federal courts any credit balance shown to be due on such an audit is a preferential claim entitled to priority over mortgage liens. By reason of these facts the defendant, Sacramento Northern Railway, is entitled to an audit of its inter-line accounts with the defendant, The Western Pacific Railroad Company, and that such an audit will show that at all times the division of through rates on interchanged business has involved a loss to Sacramento Northern Railway and a

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profit to The Western Pacific Railroad Company, except that in certain war years the defendant, Sacramento Northern Railway, was also operating profitably. That the defendant, The Western Pacific Railroad Company, has received in business delivered to it by Sacramento Northern Railway on the basis of data available to the plaintiff and believed to be accurate more than \$20,000,000 of gross revenue of which under any just segregation formula more than 50% would be fairly and justly chargeable against the defendant, The Western Pacific Railroad Company, in any equitable retroactive adjustment of the divisions underlying such inter-line settlements. That Sacramento Northern Railway is entitled to a judicial settlement of its inter-line carrier accounts with the defendant, The Western Pacific Railroad Company, for the periods (a) from the date of such audit backward to December 31, 1944, being the post-reorganization period; (b) from December 31, 1944, to August 2, 1935, being the full period of judicial operation and from August 2, 1935 back to but not through any prior judicial settlement of such accounts.

XI

Anything herein to the contrary notwithstanding this amended Bill of Complaint to the extent that it seeks a money judgment or decree in favor of Sacramento Northern Railway and against The Western Pacific Railroad Company in respect of the period prior to December 31, 1944 is hereby limited to such amounts, if any, as are found due from The Western Pacific Railroad Company to Sacramento Northern Railway upon a judicial settlement of their inter-line accounts for the period prior to August 2, 1935, and are entitled to priority over the then existing mortgage indebtedness of the defendant, The

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Western Pacific Railroad Company, and to such amounts, if any, as are found to be due upon a judicial settlement of the inter-line accounts of Sacramento Northern Railway and the Trustees for the period August 2, 1935 to December 31, 1944, and payment of which is a liability of the defendant, The Western Pacific Railroad Company, under the Assumption Agreement executed pursuant to the Order of this Court dated November 27, 1944.

XII

That no demand has been made by the plaintiff upon Sacramento Northern Railway for the institution of the derivative action herein alleged against The Western Pacific Railroad Company for the reason that Sacramento Northern Railway is a wholly-owned subsidiary of the defendant, The Western Pacific Railroad Company, its own parent; is so dominated and controlled by it in all respects that any suit instituted by it against the defendant, The Western Pacific Railroad Company, would in contemplation of a court of equity be a suit by the parent against itself and such a demand would be futile. That the defendant, Sacramento Northern Railway, being under the domination and control of the defendant, The Western Pacific Railroad Company, will not prosecute any action against the defendant, The Western Pacific Railroad Company, for the benefit of its creditors other than the defendant, The Western Pacific Railroad Company, and will not to that end apply to the Interstate Commerce Commission for an appropriate order fixing just and equitable divisions of revenues derived from inter-change business for the past periods hereinbefore referred to and for the future and that the plaintiff and other creditors of the defendant, Sacramento Northern Railway, may be remediless in the

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premises unless this Court by timely appointment of Receivers shall give such creditors the protective equivalent of an independent management.

XIII

That an analysis of the accounts of the defendants, Sacramento Northern Railway and The Western Pacific Railroad Company, in relation to the earnings of each from interchanged traffic and a restatement of such accounts on the basis of an appropriate formula will, as the plaintiff verily believes, show that the defendant, The Western Pacific Railroad Company, has absorbed earnings of the Sacramento Northern Railway far in excess of the full amount of the principal of and accrued interest upon the plaintiff's claim as stated at June 30, 1945 in the amount of \$1,441,390.55.

XIV

That the defendant, American Trust Company, is Trustee under an Indenture dated July 1, 1918, securing Bonds outstanding in the amount of \$5,224,373 or thereabouts. Said Indenture and the Bonds issued thereunder were executed by Sacramento Northern Railroad and were assumed by the defendant, Sacramento Northern Railway and constitute a lien upon properties for which the aforesaid principal sum of \$856,260 represents unpaid purchase money, and as Trustee under said Indenture said American Trust Company has an interest in the subject matter of this suit.

WHEREFORE, the plaintiff prays:

1. That the plaintiff's claim in the amount of \$1,441,390.55 together with interest accrued from June 30, 1945,

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be adjudged and decreed to be a valid and subsisting indebtedness of, and due it from, the defendant, Sacramento Northern Railway.

2. That the inter-line accounts between the defendant, Sacramento Northern Railway and the defendant, The Western Pacific Railroad Company, be judicially settled in accordance with the usages and principles of equity and that the defendant, The Western Pacific Railroad Company, be adjudged and decreed to pay to the defendant, Sacramento Northern Railway, for the benefit of the plaintiff herein and any other creditors similarly situated in priority to any creditor claims of the defendant, The Western Pacific Railroad Company, any and all amounts that may be found upon such judicial settlement to be due and owing to the Sacramento Northern Railway from the defendant, The Western Pacific Railroad Company.

3. That upon default of the payment to the plaintiff herein of the full amount of the indebtedness adjudged and decreed to be due the plaintiff from the defendant, Sacramento Northern Railway, within a time to be fixed by this Court all of the properties of the defendant, Sacramento Northern Railway, be sold free from all liens to provide for the payment and satisfaction of creditors of the defendant, Sacramento Northern Railway, in the order of their priorities; that a receiver be appointed by this Court of all and singular the railroads, rolling stock, franchises, rights properties and premises belonging to the defendant, Sacramento Northern Railway, together with the rents, issues, profits, revenues and income thereof, with the usual powers of a receiver in such cases including the power to operate said railroads and property and collect and receive the income and tolls thereof and to take into possession all properties, money, credits and everything of value belong-

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ing to said defendant, Sacramento Northern Railway, and also including the right to sue or become a party to any suit for the recovery or collection of any assets or moneys belonging to said defendant, Sacramento Northern Railway.

4. That the plaintiff herein be authorized in the name of, or on behalf of the defendant, Sacramento Northern Railway, to apply to the Interstate Commerce Commission for any administrative or other relief under the amended Interstate Commerce Act which may be necessary or proper in connection with the establishment, both retrospectively and prospectively, of just and reasonable divisions of carrier revenues on business interchanged between Sacramento Northern Railway and the defendant, The Western Pacific Railway Company, or in connection with a judicial settlement of their accounts.

5. That the plaintiff may have such other and further relief as to the Court may seem meet.

THE WESTERN PACIFIC RAILROAD CORPORATION,

By LEROY R. GOODRICH,
Bank of America Building,
Oakland 12, California.
Its Attorney.

Dated , 1948.

FRANK C. NICODEMUS, JR.,
A. PERRY OSBORN,
Of Counsel.

[Title of District Court and Cause.]

Respondent's Points and Authorities in Support of
Its Answer and Return to Petition of The West-
ern Pacific Railroad Corporation for Clarifica-
tion or Modification of Final Order.

I.

By its order of March 19, 1947 herein, this Court conclusively determined that Petitioner's asserted claim was "released and discharged," and that the assertion thereof "was and is barred and enjoined," by this Court's final order of March 28, 1946.

Orders and decrees of courts of bankruptcy, in proceedings in reorganization, are res judicata of the issues determined.

Stoll v. Gottlieb (1938) 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104, where res judicata effect was given to order cancelling guaranty by third person of bonds of debtor.

Chicot County Drainage District v. Baxter State Bank (1940) 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. 329, where res judicata effect was given to readjustment order under Municipal Debt Readjustment Act even though that Act was later, in another case, held unconstitutional by the Supreme Court.

The rule is the same even though it be claimed that the bankruptcy court's order was too broad and went beyond the petition upon which it was made. See:

In re National Public Service Corporation
(CCA 2d, 1937) 88 F. (2d) 19.

By its order herein dated March 19, 1947, holding The Western Pacific Railroad Corporation in contempt, this Court, speaking by Judge St. Sure, expressly held that the claim which The Western Pacific Railroad Corporation now seeks to assert in behalf of Sacramento Northern Railway to a retroactive readjustment of divisions of rates was barred and enjoined by the provisions of the Final Order herein dated March 28, 1946. The entire text of the order of March 19, 1947 has been incorporated in this Respondent's answer and return to the petition herein, as Exhibit F thereto. We quote herewith paragraph (f) of that Order:

“(f) That in and by said action The Western Pacific Railroad Corporation has asserted and now asserts a claim against the petitioner which, if it exists at all, existed on and before December 28, 1944, and was released and discharged by said Final Order; that the assertion of such a claim was and is barred and enjoined by said Final Order; and that the commencement of said action is not and has not been provided for or permitted by any order of this Court.” (Emphasis supplied.)

The order of March 19, 1947 might have been open to direct review upon appeal. It was not, and is not, subject to review otherwise. No appeal was taken. The order was allowed to become final, and the Petitioner dismissed its suit as to The Western Pacific Railroad Company.

The order of March 19, 1947 is therefore res judicata of the issue and precludes any reconsideration of the scope and effect of the Final Order as bar-

ring the Petitioner's attempted assertion of a claim to a retroactive readjustment of divisions of rates between the Sacramento Northern Railway and The Western Pacific Railroad Company.

II.

This Court having determined that Petitioner's claim has been "released and discharged" by Final Order of March 28, 1946, no ground has been or can be stated for modifying the injunctive provisions of the Final Order.

Petitioner represents that it has a claim that it is entitled to assert derivatively in behalf of Sacramento Northern Railway to a retroactive readjustment of divisions of rates between the latter and the Company; that this claim took priority over the Company's mortgages and survived the reorganization proceedings and constitutes a present valid claim; that the injunctive provisions of the Final Order were drawn so broadly as to bar such a claim, although such was not the intent of the Final Order; wherefore, the Court is asked to modify the injunctive provisions of the Final Order so as to permit suit upon this derivative claim.

By its order of March 19, 1947, adjudging Petitioner guilty of contempt, this Court expressly determined that the alleged derivative claim, if it ever existed, "was released and discharged by said Final Order." This is a final and binding determination that Petitioner's claim has no present existence—that there is nothing that Petitioner may now assert. No appeal having been taken from the order of March 19, 1947, it is now, under the au-

thorities cited under Point I, *supra*, *res judicata* as to Petitioner that the claim has been discharged.

It therefore appears that Petitioner's petition seeks a modification of the injunctive provisions of the Final Order so that it may assert a claim which the Court has already conclusively determined to have been released and discharged. In the very nature of the case the petition fails to state any ground for modification.

III.

This Court correctly determined, by its order of March 19, 1947 in the contempt proceeding, that Petitioner's claim is barred by the Final Order of March 28, 1946 in the reorganization proceeding.

Claims which might have been but were not presented during the reorganization proceeding may not be later asserted.

Standard Steel Works v. American Pipe & Steel Corp. (CCA 9th 1940) 111 F. (2d) 1000.

American Service Co. v. Henderson, (CCA 4th 1941) 120 F. (2d) 525.

In re Corona Radio & Television Corp., (CCA 7th 1939) 102 F. (2d) 959.

The statute explicitly declares that, upon confirmation of the reorganization plan by the judge, the provisions of the plan shall be "binding upon * * * all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed,

whether or not approved, including creditors who have not, as well as those who have, accepted it.” (Section 77(f) of Federal Bankruptcy Act. (United States Code, Title II, Chap. 8, Sec. 205)).

The plan of reorganization, formulated by the Interstate Commerce Commission and confirmed by this Court, expressly finds that the unsecured claims of The Western Pacific Railroad Corporation are “without value.” (Finance Docket 10913, Western Pacific Railroad Company Reorganization, 233 I.C.C. 409, 452).

This Court’s final order of March 28, 1946 declares, *inter alia*, that

“The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order.”

(The “said order” referred to in the closing words of the foregoing is the revesting order of November 27, 1944, which contains no provision preserving claims of the character here attempted to be asserted by Petitioner.)

The injunctive provisions of the Final Order are commensurate with the “release and discharge”. By paragraph 6 of the Final Order “All persons * * * are hereby perpetually restrained and en-

joined from instituting * * * any suit * * * against The Western Pacific Railroad Company, * * * directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), * * * and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this court), * * *."

We again note that no sanction can be found in any prior order of the Court for the institution of suit upon the Petitioner's claim.*

*In the contempt proceedings the Petitioner unsuccessfully contended—and it now seeks to renew that contention—that suit upon the Petitioner's claim is permitted by a prior order of the Court. (See answer and return of The Western Pacific Railroad Corporation to petition and order to show cause in the contempt proceeding, particularly paragraphs 6 to 10, inclusive, and the rejoinder of The Western Pacific Railroad Corporation in the same proceeding, page 3.) Judge St. Sure expressly found that the claim had been "released and discharged" by the Final Order and that the institution of the suit "has not been provided for or permitted by any order of this Court."

In summary, the assertion of Petitioner's claim against the reorganized The Western Pacific Railroad Company is barred by the provisions of the statute, by the terms of the reorganization plan, which has long since been consummated, and by the provisions of this Court's Final Order in the reorganization proceeding. It was correctly determined, by the order in the contempt proceeding, that this claim has been "released and discharged" and that the institution of suit upon it is not permitted by any prior order of court.

IV.

Petitioner has no standing to assert claims of Sacramento Northern Railway.

A claimant who has not reduced his claim to judgment is not entitled to maintain a creditor's bill or to seek any equitable relief in connection with claims which the alleged debtor may have against third persons.

Swan Land & Cattle Co. v. Frank (1893) 148

U. S. 603, 13 Sup. Ct. 691, 694, 37 L. Ed. 577.

Hoehn v. Crews, 144 F. (2d) 665 (CCA 10th

1944) cert. denied, 323 U. S. 773, 65 Sup. Ct.

132, 135, 89 L. Ed. 618, appeal by one defendant affirmed on other grounds.

Nielsen v. Gillespie (1929) 97 Cal. App. 319, 275 P. 500.

Delaney Producing & Refining Co. v. Crystal

Petroleum Products Co. (1928) 88 Cal. App.

784, 264 P. 521.

Petitioner has not prosecuted its claim to judg-

ment against the Sacramento Northern Railway.* Unless and until it has done so, and the judgment shall have been returned unsatisfied, it has no standing to bring suit against The Western Pacific Railroad Company upon any alleged indebtedness of the latter to the Sacramento Northern Railway.

V.

This Court Has no Jurisdiction to Modify the Final Order at the Request of This Petitioner.

By a petition filed in the reorganization proceeding on March 18, 1946, the Reorganization Committee requested a Final Order terminating the proceeding. This Court on that day directed that a hearing be held on the petition on March 28, 1946, and that notice of the hearing be sent to all parties to the reorganization, including Petitioner. Notice was sent as directed. This Court on March 28, 1946, after hearing, signed and filed the Final Order discharging the debtor from all of its liabilities (except as otherwise expressly provided) and closing the proceeding. The objections to the order which Petitioner now asserts could have been but were not asserted by Petitioner at the hearing upon the petition of the Reorganization Committee; nor did Petitioner appeal from the Final Order. Under these circumstances, the Court has

*The asserted indebtedness of Sacramento Northern Railway to Petitioner arose in 1928, some twenty (20) years past. The claim is believed to have been long since barred by limitation. If held barred, there could be no predicate for a creditor's bill against The Western Pacific Railroad Company.

no jurisdiction to modify the Final Order at the request of this Petitioner.

Duebler v. Sherneth Corp., (CCA 2nd 1947)
160 F. (2d) 472.

Reese v. Beacon Hotel Corp., 149 F. (2d) 610
(CCA 2nd 1945).

In re Sherland Bldg. Corp., (N. D. Ind. 1939)
29 F. Supp. 985.

The Court has no jurisdiction, without first re-opening the case, to modify its Final Order in a bankruptcy proceeding in the absence of an appropriate reservation of jurisdiction.*

In re Argyle-Lake Shore Corporation, (CCA 7
1938) 98 F. (2d) 372.

In re Peyton Realty Company, (CCA 3, 1945)
148 F. (2d) 771.

In re Wedgewood Hotel Company, (CCA 7,
1942) 125 F. (2d) 327.

In re Corona Radio & Television Corporation,
(CCA 7, 1939) 102 F. (2d) 959.

In the present instance this Court reserved no jurisdiction to modify its Final Order and the present petition is in no sense a petition to reopen the case.

A court sitting in a bankruptcy proceeding will not in any event reopen a case where, as here, it has no power to grant the ultimate relief sought.

*It has been held that "reservation of jurisdiction beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court." *Reese v. Beacon Hotel Corp.*, 149 F. (2d) 610, 611; (CCA 2nd, 1945); citing cases.

Duebler v. Sherneth Corporation, (CCA 2, 1947) 160 F. (2d) 472.

Milando v. Perrone, (CCA 2, 1946) 157 F. (2d) 1002.

Phillips v. Tarrier Co. of Delaware, (CCA 5, 1938) 93 F. (2d) 674.

VI.

This Court, Even if It Had Jurisdiction to Modify the Final Order, Should Not Exercise That Jurisdiction Under the Circumstances Here Presented.

There is no equity in the petition. Even if the Court were to conclude that it has jurisdiction to modify the Final Order at the request of this Petitioner, that jurisdiction should not be exercised in the instant proceeding for the following reasons:

(a) The divisions of rates between Sacramento Northern Railway and the Company were established at a time when the Petitioner, as parent of the railroad group of which the Sacramento Northern Railway and the Company were members, had full control over such divisions of rates;

(b) Petitioner for many years prior to the reorganization and at all times during the reorganization was familiar with such divisions of rates and did not complain of them;

(c) Petitioner was not only a party to the reorganization proceeding but, prior to the confirmation and consummation of the reorganization plan, was the sole stockholder of the Company and one of its largest unsecured creditors. Although Peti-

tioner presented its claims as a stockholder and unsecured creditor, it failed to present the claim which it now seeks to assert;

(d) Petitioner represents that the claim which it now seeks to assert, and which it failed to present or assert during the reorganization proceeding, is entitled to priority over the preexisting bond mortgages of the Debtor, and should rank with the reorganized Company's current liabilities. Thus, Petitioner seeks to gain priority, for an unsecured claim which it failed to present or assert during the reorganization proceeding, over the secured claims of creditors found to be entitled to priority under the plan of reorganization heretofore consummated;

(e) Since the entry of the Final Order, the reorganized Company has conducted its business, and investors have purchased and held securities of the reorganized Company, in reliance upon the Final Order, and such reliance makes modification of the order inequitable.

Under circumstances such as these, the Court will not entertain a request for modification of a final order in a reorganization proceeding.

Mohonk Realty Corp. v. Wise Shoe Stores, Inc.,
111 F. (2d) 287 (CCA 2d 1940), cert. denied,
311 U. S. 654, 61 Sup. Ct. 47, 85 L. Ed. 418
(1940).

Knapp v. Detroit Leland Hotel Co., (CCA 6th
1946) 153 F. (2d) 715.

In re Tom Moore Distillery Co., 52 F. Supp.
938 (W. D. Ky. 1943).

In re McCrory Stores Corp., 19 F. Supp. 367
(S.D. N.Y. 1937).

In re Peyton Realty Co., (CCA 3, 1945) 148
F. (2d) 771.

In re Universal Lubricating Systems, Inc.,
(1947) 71 F. Supp. 775.

CONCLUSION

Doubtless it would have sufficed, in resisting the petition, to rely solely upon this Court's order of March 19, 1947 in the contempt proceeding as res judicata of the issue which Petitioner seeks again to urge upon the Court's attention. It has seemed appropriate, however, to acquaint the Court more fully with the circumstances and reasons which preclude the Petitioner from prosecuting its asserted claim against the reorganized The Western Pacific Railroad Company.

The petition for clarification or modification of this Court's final order of March 28, 1946, should be denied.

Respectfully submitted,

/s/ ALLAN P. MATTHEW

/s/ ROBERT L. LIPMAN

/s/ BURNHAM EMERSEN

Attorneys for The Western Pacific
Railroad Company.

Of Counsel

McCUTCHEN, THORNE, MATTHEW,
GRIFFITHS & GREENE

Dated: Oct. 25th, 1948.

Appendix Follows

For convenient reference, we have set forth in the appendix hereto certain pertinent excerpts from the statute, the plan of reorganization and orders in the reorganization proceeding, together with the entire text of the agreement of assumption.

APPENDIX

Excerpts from (a) Section 77 of Federal Bankruptcy Act; (b) the Western Pacific Railroad Company Reorganization Plan Formulated by Interstate Commerce Commission and Approved and Confirmed by Court; (c) Certain Orders of United States District Court in Reorganization Proceeding; and (d) Agreement of Assumption Between Reorganization Trustees and Reorganized The Western Pacific Railroad Company.

A.

Section 77(f) of Federal Bankruptcy Act. (United States Code, Title 11, Chap. 8, Sec. 205).

Binding Effect of Confirmation; Discharge of Debtor from Liabilities; Issuance of Securities.

“(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved,

including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall,

without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1* of Title 49 as on August 27, 1935, or thereafter amended. * * * *"

B.

Excerpts from Order of the Interstate Commerce Commission (June 21, 1939) Approving Plan of Reorganization for The Western Pacific Railroad Company. (Finance Docket No. 10913, 233 I.C.C. 409.)

(Definition of certain terms used in order.)

"The debtor shall mean the Western Pacific Railroad Company." (p. 441.)

"Consummation of the plan shall mean the transfer to the reorganized company, to the extent contemplated by the plan, of the properties and assets of the debtor." (p. 441.)

* * * *

"The reorganized company shall mean the corporation, whether the debtor or a new corporation, which shall acquire substantially all of the properties now held by the bankruptcy trustees and issue the new securities provided for by the plan." (p. 441.)

(Subdivision P)

* * * *

"6. The unsecured claims of the Western Pacific

*Interstate Commerce Act.

Railroad Corporation and the Western Realty Company and other unsecured claims not entitled to priority over existing mortgages, are found to be without value, and no securities or cash shall be distributed under the plan in respect of these claims.” (p. 452.)

“7. The capital stock of the debtor is found to be without equity or value, and the stockholders shall not be entitled to participate in the plan.” (p. 452.)

(Subdivision Q)

“Q. Claims against the debtor entitled to priority over any mortgage of the debtor, current liabilities and obligations incurred by the trustees of the properties of the debtor during the reorganization proceeding, and expenses of reorganization allowed by the court within the maximum fixed by this Commission shall be paid in cash or assumed by the reorganized company, provided that any amounts so assumed by the reorganized company shall constitute a charge upon the properties of the reorganized company prior in lien to all new securities issued under the plan. When so treated, claims against the debtor entitled to priority over any of its mortgages are found not to be affected by the plan. Obligations under the debtor’s equipment-trust certificates, the Baldwin lease, and the Pullman contract are found not to be materially and adversely affected by the plan. The reorganized company shall be deemed to have assumed the executory contracts of the debtor which by their terms do not terminate at or prior to the conclusion of the re-

organization proceeding and which shall have been affirmed or shall not have been disaffirmed by the trustees of the properties of the debtor with the approval of the court prior to the confirmation of the plan, and also any executory contracts made by the trustees of the properties with the approval of the court which by their terms do not terminate at or prior to the conclusion of the reorganization proceeding.” (pp. 452-453.)

(Subdivision R)

“R. The capital stock of the debtor and the unsecured claims against the debtor not entitled to priority over existing mortgages shall be canceled.” (p. 453.)

* * * *

“The plan may be carried out either by revesting the properties formerly of the debtor in the debtor company or by transferring said properties to a new corporation organized for the purpose, and the execution by the corporation in which said properties are vested of the new mortgages and the issue by it of the new securities contemplated by the plan.” (p. 453.)

C.

Orders of United States District Court in Western Pacific Reorganization Proceeding.

(Order of United States District Court directing the revesting of the properties of the debtor in the reorganized company, etc., November 27, 1944.)

* * * *

“8. The Western Pacific Railroad Company and its proper officers are hereby authorized and di-

rected to execute and deliver each and every of the following agreements and indentures, on or before December 28, 1944, as requested by the Reorganization Committee:

(a) Agreement providing for the assumption of certain obligations, liabilities, contracts, agreements and leases of the debtor and the debtor's Trustees, substantially in the form attached to this order as 'Exhibit D,'* the form and provisions of which are hereby approved;''

* * * *

"9. The Western Pacific Railroad Company shall assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by the debtor's Trustees and remaining in effect on the date of the actual delivery of possession by said Trustees and the actual termination of the responsibility of the debtor's Trustees for the operation of the debtor's properties, as hereinafter provided in this order, and which have heretofore been assumed or not disaffirmed by said Trustees, which remain in effect on December 31, 1944, together with the expenses of this reorganization as allowed by the Court within the maximum fixed by the Interstate Commerce Commission."

* * * *

*The form and provisions of this "Exhibit D" are identical with the form and provisions of the "Agreement of Assumption," the text of which is reproduced in full in subdivision D of this memorandum.

“And, further, without limitation of the generality of the obligations hereinabove imposed upon The Western Pacific Railroad Company, that company shall (a) specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment, being the coupons which this Court by orders of March 11, 1936 and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor, and (b) assume liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in said proceeding and without prejudice by reason of such proof not having been made. The above ordered assumption and adoption shall be evidenced by the execution by said Railroad Company of the agreement of assumption referred to in paragraph ‘8(a)’ above and of such other instruments of assumption as may be appropriate; and said Railroad Company shall succeed to all rights, privileges, liabilities and duties of the debtor or the debtor's Trustees under such contracts, leases and agreements; provided, however, that this order shall not be construed as a modification of any former orders of this Court barring or settling claims against the debtor or the debtor's Trustees, and said Railroad Company shall assume only the valid and outstand-

ing obligations and liabilities of the debtor or the debtor's Trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged, and only such obligations and liabilities as are preserved under the plan of reorganization and are not limited or discharged by the prior orders of this Court.

10. The Western Pacific Railroad Company shall pay, in such amounts as have heretofore been, or shall hereafter be determined by this Court, but only to the extent that the same shall not have been paid by the debtor's Trustees, all expenses and costs of administration of this proceeding, including, without limiting the generality of the foregoing, all allowances of compensation for services heretofore or hereafter rendered and reimbursement of expenses heretofore or hereafter incurred in connection with this reorganization proceeding or the plan of reorganization, subsequent to October 31, 1939; provided, however, that said Railroad Company is authorized to pay, in its discretion, without further order of this Court and regardless of amount, all rentals, costs and expenses growing out of the joint use of the property of other carriers, and all taxes, and all other obligations (not including any such allowances of compensation for services or reimbursement of expenses) incurred subsequent to August 2, 1935, by the debtor or the debtor's Trustees in the ordinary course of business in the operation of the aforesaid business, assets or property, pur-

suant to the general authorizations granted by this Court.

11. The date for the consummation of the plan of reorganization, and the date upon which the first mortgage bondholders and secured creditors of the debtor shall be entitled to receive in exchange for their old securities, the new securities and adjustment payments under the plan, as heretofore approved and authorized by this Court, is hereby fixed as December 29, 1944; all of the business, assets and property constituting the debtor's estate, of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees herein, shall vest in and be and become the absolute property of The Western Pacific Railroad Company on said date, free and clear of all rights, claims, liens and interests of said Trustees, the former stockholders and creditors of the debtor, and of all other persons, firms and corporations whatsoever, except as is otherwise provided in this order, and the said Railroad Company shall thereupon be forever released and discharged from all of its debts, obligations and liabilities, except as herein provided;”

* * * *

“15. Until the further order of this Court, and except as the creation of liens is specifically provided for or permitted by this Court, all persons, firms or corporations, whatsoever or wheresoever situated, located or domiciled, are hereby restrained or enjoined from interfering with, attaching, gar-

nishing, levying upon, granting or enforcing liens against or upon, or in any manner whatsoever disturbing any part of the assets, goods, moneys, railroad, properties and premises belonging to or in the possession of said Railroad Company on and after the time specified in paragraph '11' hereof, by reason of or growing out of any obligation or obligations heretofore incurred by the debtor or the debtor's Trustees herein."

(Final Order of United States District Court,
March 28, 1946)

Final Order

"The petition filed March 18, 1946 by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the duly constituted Reorganization Committee designated to carry out the plan of reorganization of The Western Pacific Railroad Company above named, for an order approving their expenses, discharging the Committee and terminating the proceedings duly came on to be heard on March 28, 1946, and was heard and has been submitted.

The Court being fully advised in the premises finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court dated and filed March 18, 1946, and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) All of the business, assets and property constituting the debtor's estate of every kind and

character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees in Reorganization, vested in and became the absolute property of The Western Pacific Railroad Company on December 29, 1944, free and clear of all rights, claims, interests, liens and encumbrances of the former stockholders and creditors of the debtor company and all other persons, except as otherwise provided and directed in the order of this Court in this proceeding dated and entered November 27, 1944; and The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order."

* * * *

"Now, Therefore, it is hereby Ordered, Adjudged and decreed:

1. That these proceedings be and they hereby are terminated subject only to the reservations of jurisdiction hereinafter made by the Court in this order, and the reservations of jurisdiction contained in the order of this Court discharging the Trustees of the Debtor's estate, dated and entered May 21, 1945."

* * * *

"5. That the order of this Court dated and

entered November 27, 1944 in this proceeding shall remain in full force and effect in so far as said order has not been fully carried out.

6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against The Western Pacific Railroad Company, or against the successors or assigns of said Company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's

estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings."

* * * *

"9. The Court hereby reserves jurisdiction to take such further proceedings as may be proper or necessary to enforce and make effective any direction or other provision contained in the order of this Court, filed November 27, 1944 in this proceeding, to enforce and make effective the terms and provisions of this final decree and, if necessary, to give instructions to the Western Pacific Railroad Company, upon application by said Company, with respect to carrying out the provisions of said order filed November 27, 1944, and of this order; to take such further proceedings as may be proper or necessary in connection with any appeal or appeals prosecuted from any order of this Court, in this proceeding; and to take such further proceedings as may be necessary or proper in connection with any expenses or liabilities within the provisions of the order of this Court filed October 23, 1944, or

otherwise, which may hereafter be asserted against the Reorganization Committee, its agents or attorneys, in connection with carrying out and putting into effect the plan of reorganization.

10. Except as hereby specifically provided in the reservations of jurisdiction set forth in Paragraph 9 above, and except as provided in the reservations of jurisdiction of the order of this Court filed May 21, 1945, discharging the Trustees of the debtor's estate, the reorganization proceedings in this Court entitled in the Matter of the Western Pacific Railroad Company, Debtor, No. 26591-S, are hereby terminated and the case is closed.

Dated: March 28, 1946.

A. F. St. SURE
District Judge."

D.

Agreement of Assumption.

"Whereas, heretofore in a proceeding in the United States District Court for the Northern District of California, Southern Division, for the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, entitled 'In the Matter of The Western Pacific Railroad Company, Debtor,' No. 26591-S, a Plan of Reorganization of The Western Pacific Railroad Company was approved and confirmed, and, pursuant to the provisions of said Plan of Reorganization, an order was entered on September 25, 1944, by said Court approving the use of the said debtor company, The

Western Pacific Railroad Company, a corporation organized and existing under the laws of the State of California, as the reorganized company in carrying out said plan;

Whereas, the Interstate Commerce Commission, under date of October 24, 1944, in Docket No. 10913, made a report and order which, among other thing, approved and authorized the assumption by said The Western Pacific Railroad Company of obligations and liabilities as provided in said plan;

Whereas, pursuant to said Plan of Reorganization and to the order entered in said proceeding on November 27, 1944, T. M. Schumacher and Sidney M. Ehrman, as Trustees of the property of said The Western Pacific Railroad Company, duly appointed in said proceeding (hereinafter called the 'Trustees'), have, by deed dated December 29th, 1944, remised, released, transferred, conveyed and quit-claimed to the undersigned, said The Western Pacific Railroad Company, all of the property, real, personal and mixed, of every kind and nature, vested in, held, possessed, used or controlled by said Trustees;

Now, Therefore, pursuant to the provisions of said order entered November 27, 1944, and in consideration of the said release, transfer and conveyance by the Trustees, the undersigned The Western Pacific Railroad Company, for itself, its successors and assigns, make this Agreement with said Trustees, for the benefit of said Trustees and of all other parties in interest in the above-entitled proceedings, under which agreement the undersigned does hereby:

1. Assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by said Trustees and remaining in effect on December 31, 1944, and all contracts, leases and agreements of the debtor in effect on August 2, 1935, either assumed or not disaffirmed by said Trustees, which remain in effect on December 31, 1944, and expenses of reorganization allowed by the Court within the maximum fixed by the Interstate Commerce Commission;

2. Assume any and all outstanding current liabilities and obligations incurred by said Trustees and without limitation thereto, any and all liabilities or obligations of the debtor in possession or said Trustees with respect to claims for personal injury or death, for loss or damage to property and generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business, including liabilities and obligations hereafter arising up to midnight December 31, 1944.

3. Without limitation of the generality of the foregoing agreements in paragraphs 1 and 2 hereof, specifically undertake to defend at its own sole cost and expense all suits and proceedings, of whatsoever character, now or hereafter instituted against the Trustees, or either of them, arising out of the possession, use or operation of the debtor's properties by the Trustees or of their conduct of the debtor's business, and to assume the conduct of all

suits and proceedings, of whatsoever character, heretofore or hereafter brought by the Trustees in the discharge of their duties and responsibilities as such, and, generally, to indemnify the Trustees and save them harmless against all expense, liability, loss, judgments, claims and demands arising out of such suits or proceedings. It is the intent of the covenants in this paragraph 3 contained that The Western Pacific Railroad Company shall assume responsibility for all such suits and proceedings to which the Trustees, or either of them, are or shall become parties, to the same effect as if The Western Pacific Railroad Company instead of the Trustees had been party thereto in the first instance.

4. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to perform the obligations of the Trustees in respect of the following:

(a) \$1,235,000 unpaid balance, principal amount of Three Per Cent. Equipment Trust Certificates, Series of 1937, issued February 1, 1937, under Agreement of same date, between J. T. Harrigan and F. E. Egly, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(b) \$1,855,000 unpaid balance, principal amount of One and Three Quarters Per Cent Equipment Trust Certificates, Series of 1941, issued August 1, 1941, under Agreement of same date, between M. J. Suydam and F. W. Walter, Vendors, with Central

Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(c) Conditional Sale Agreement, dated as of May 25, 1943, between Lima Locomotive Works, Incorporated, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six steam freight locomotives.

(d) Conditional Sale Agreement, dated as of June 21, 1943, between Electro-Motive Division, General Motors Corporation and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of three 5400 H.P. diesel electric freight locomotives.

(e) Conditional Sale Agreement, dated as of June 1, 1944, between The Chase National Bank of the City of New York and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six 5400 H. P. diesel electric freight locomotives.

5. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to

September 1, 1933, and had not theretofore been presented for payment; such coupons being those which the Court by orders of March 11, 1936 and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor.

6. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, assume the liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in the said proceeding and without prejudice by reason of such proof not having been made.

This agreement shall become effective on December 29, 1944, at 12:01 A.M., Pacific War Time.

In Witness Whereof, the undersigned has caused this instrument to be executed in its behalf by its President and its corporate seal to be hereunto affixed this 14th day of December, 1944.

THE WESTERN PACIFIC RAILROAD
COMPANY

By CHARLES ELSEY
President

(Corporate Seal)

Attest:

C. L. DROIT
Secretary."

[Endorsed]: Filed Oct. 25, 1948.

[Title of District Court and Cause.]

Order Denying Petition of the Western Pacific Railroad Corporation for Clarification or Modification of Order of March 28, 1946.

Ordered: The petition of The Western Pacific Railroad Corporation, filed herein September 30, 1947, for clarification or modification of the injunctive provisions of the final order herein dated March 28, 1946, having been agrued and submitted, the same is hereby denied.

Dated: October 29, 1948.

/s/ LOUIS GOODMAN

United States District Judge.

[Endorsed]: Filed Oct. 29, 1948.

[Title of District Court and Cause]:

NOTICE

To McCutchen, Thomas, Matthew, Griffiths & Greene, Balfour Bldg. Leroy R. Goodrich, Bank of America Bldg., Oakland.

You Are Hereby Notified that on Friday, October 20, 1948, Judge Goodman made an order denying the petition of the Western Pacific Railroad Corporation for Clarification or Modification of Mar. 28, 1946.

San Francisco, California Nov. 1, 1948

C. W. CALBREATH

Clerk, U. S. District Court

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Western Pacific Railroad Corporation, petitioner in the above entitled matter, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from an order made and entered by the District Court on October 20, 1948, denying the petition of the Western Pacific Railroad Corporation for clarification or modification of the injunctive provisions of the final order herein, dated March 28, 1946, for the purpose of permitting the petitioner to file an amended bill of complaint in Action No. 26333-H, entitled Western Pacific Railroad Corporation, Plaintiff, against Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants.

Signed: November 17, 1948.

LEROY R. GOODRICH

FRANK C. NICODEMUS, JR.

A. PERRY OSBORN

By /s/ LEROY R. GOODRICH

Attorneys for Petitioner

[Endorsed]: Filed Nov. 17, 1948.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Notice is hereby given that the Western Pacific Railroad Corporation, petitioner in the above entitled matter, hereby appeals to the United States

Court of Appeals for the Ninth Circuit from an order made and entered by the District Court on October 29, 1948, denying the petition of the Western Pacific Railroad Corporation for clarification or modification of the injunctive provisions of the final order herein, dated March 28, 1946, for the purpose of permitting the petitioner to file an amended bill of complaint in Action No. 26333-H, entitled Western Pacific Railroad Corporation, Plaintiff, against Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants.

Signed: November 29, 1948.

LEROY R. GOODRICH
FRANK C. NICODEMUS, JR.
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH
Attorneys for Petitioner

[Endorsed]: Filed Nov. 29, 1948.

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME

It Is Hereby Stipulated and Agreed, by and between the respective parties that The Western Pacific Railroad Corporation, petitioner in the above entitled matter, having filed on November 17, 1948, its notice of appeal to the United States Court of Appeals for the Ninth Circuit from an order made

and entered by the District Court on October 29, 1948, denying the petition of The Western Pacific Railroad Corporation for clarification or modification of the injunctive provisions of the final order of the District Court, dated March 28, 1946, for the purpose of permitting the petitioner to file an amended bill of complaint, as recited in said petition, may have to and including January 19, 1949, within which to file its Designation of Contents of Record on Appeal and its Statement of Points on which appellant intends to rely.

Dated: December 23, 1948.

LEROY R. GOODRICH
FRANK C. NICODEMUS, JR.
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH
Attorneys for Appellant

ALLAN P. MATTHEW
ROBERT L. LIPMAN
BURNHAM ENERSEN
McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

By /s/ ROBERT L. LIPMAN
Attorneys for Respondent

No extension of time heretofore obtained.

ORDER

Pursuant to the above Stipulation, and good cause appearing therefor, it is hereby ordered that the appellant, The Western Pacific Railroad Corporation, may have to and including the 19th day of

January, 1949, within which to file its Designation of Contents of Record on Appeal and its Statement of Points on which appellant intends to rely.

Dated: December 23rd, 1948.

/s/ LOUIS GOODMAN

U. S. District Court Judge

[Endorsed]: Filed Dec. 23, 1948.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH THE
APPELLANT, THE WESTERN PACIFIC
RAILROAD CORPORATION WILL RELY

The Western Pacific Railroad Corporation has heretofore appealed to the United States Court of Appeals for the Ninth Circuit from an Order made by the above entitled District Court on October 29, 1948, denying the Petition of The Western Pacific Railroad Corporation for clarification or modification of the injunctive provisions of the Final Order of the District Court, dated March 28, 1946, for the purpose of permitting The Western Pacific Railroad Corporation to file an Amended Bill of Complaint, as recited in said petition.

Appellant hereby makes the following statement of points on which it will rely on its appeal:

I. The learned District Court erred in holding the Order made on March 19, 1947 by Judge A. F. St. Sure to constitute a bar to the filing and prosecution of the cause of action or causes of action alleged in the proposed Amended Bill of Complaint

in which The Western Pacific Railroad Company is named as one of the parties defendant, and in denying the plaintiff the relief sought, for each and all of the following reasons:

A. The Final Order or Decree of March 28, 1946 in the reorganization proceedings involving The Western Pacific Railroad Company expressly excepts from its injunctive provisions any cause of action against the respondent, The Western Pacific Railroad Company, growing out of inter-line accounts prior to August 2, 1935, and does not prohibit a derivative cause of action by this plaintiff on behalf of Sacramento Northern Railway against the respondent, The Western Pacific Railroad Company, to recover amounts due under just and equitable division of revenues from business interchanged prior to August 2, 1935.

B. The proposed Amended Bill of Complaint contains the following restrictive paragraph not appearing in the original Bill of Complaint considered by Judge St. Sure, under which the Amended Bill of Complaint, insofar as it sets forth a derivative cause of action in favor of Sacramento Northern Railway, expressly excludes any cause of action not falling within the exceptive provisions of the Final Order or Decree of March 28, 1946:

“Anything herein to the contrary notwithstanding this amended Bill of Complaint to the extent that it seeks a money judgment or decree in favor of Sacramento Northern Railway and against The Western Pacific Railroad Company in respect of the period prior to December 31, 1944 is hereby

limited to such amounts, if any, as are found due from The Western Pacific Railroad Company to Sacramento Northern Railway upon a judicial settlement of their inter-line accounts for the period prior to August 2, 1935, and are entitled to priority over the then existing mortgage indebtedness of the defendant, The Western Pacific Railroad Company, and to such amounts, if any, as are found to be due upon a judicial settlement of the inter-line accounts of Sacramento Northern Railway and the Trustees for the period August 2, 1935 to December 31, 1944, and payment of which is a liability of the defendant, The Western Pacific Railroad Company, under the Assumption Agreement executed pursuant to the Order of this Court dated November 27, 1944.”

C. The Assumption Agreement executed by the defendant, The Western Pacific Railroad Company, renders it liable in a derivative action in favor of Sacramento Northern Railway by this appellant to recover amounts due under just and equitable division of revenues from business interchanged with Thomas M. Schumacher and Sidney M. Erhman, Trustees in Reorganization, subsequent to August 2, 1935, and prior to December 31, 1944.

D. The Decree of March 28, 1946, and the Order made by Judge St. Sure on March 19, 1947, do not extend to or prohibit the prosecution by the plaintiff and appellant herein of a derivative cause of action against The Western Pacific Railroad Company to recover amounts due under just and equitable division of revenues from business interchanged subsequent to December 31, 1944.

E. The Final Order or Decree of March 28, 1946, and the Order of Judge St. Sure entered March 19, 1947, do not prevent or purport to prevent the plaintiff and appellant, The Western Pacific Railroad Corporation, from joining in a suit properly instituted and pending against Sacramento Northern Railway, which was not a party to the reorganization proceeding, wherein said March 19, 1947 Order was entered, any proper or necessary party to a complete determination of such cause of action against Sacramento Northern Railway, even though such proper or necessary party happens to be the respondent, The Western Pacific Railroad Company, or any other party to said reorganization proceeding.

II. The Final Order or Decree of March 28, 1946 should be liberally construed to permit the filing and prosecution of any legitimate lawsuit not within the spirit and intent of its restrictive provisions, in which category this proposed Amended Complaint indubitably falls; it being axiomatic that the doors of the Court should be as wide open as the doors of a church.

LEROY R. GOODRICH

FRANK C. NICODEMUS, JR.

A. PERRY OSBORN

By /s/ LEROY R. GOODRICH

Attorneys for The Western Pacific
Railroad Corporation

[Endorsed]: Filed Jan. 17, 1949.

[Title of District Court and Cause.]

STIPULATION FOR ORDER EXTENDING
TIME

Whereas, The Western Pacific Railroad Corporation has filed notice of appeal herein from the order of the above entitled court dated October 29, 1948 denying the Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, Dated March 28, 1946; and

Whereas, the appellant and respondent, The Western Pacific Railroad Company, have by written stipulation designated the record on appeal.

It Is Hereby Stipulated, that the time within which to docket the record on appeal may be extended by order of the District Court to January 28, 1949.

Dated the 19th day of January, 1949.

LEROY R. GOODRICH
FRANK C. NICODEMUS, JR.
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH
Attorneys for The Western Pacific
Railroad Corporation
ALLAN P. MATTHEW
ROBERT L. LIPMAN
BURNHAM ENERSEN

By /s/ ROBERT L. LIPMAN
Attorneys for The Western Pacific
Railroad Company

ORDER

Good cause appearing therefore, it is hereby ordered that the appellant, The Western Pacific Railroad Corporation, herein may have to and including January 28, 1949, to docket the Record on Appeal in the United States Court of Appeals in and for the Ninth Circuit.

Dated the 19th day of January, 1949.

/s/ LOUIS GOODMAN
District Judge

[Endorsed]: Filed Jan. 19, 1949.

[Title of District Court and Cause.]

STIPULATION FOR RECORD ON APPEAL

Whereas, The Western Pacific Railroad Corporation has filed notice of appeal herein from the order of the above entitled court dated October 29, 1948 denying the Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, Dated March 28, 1946;

Now, Therefore, The Western Pacific Railroad Corporation, appellant, and The Western Pacific Railroad Company, appellee, by this written stipulation designate the following to be included in the record on appeal, to wit:

(1) Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order Herein, Dated March 28, 1946

(2) Answer and Return of The Western Pacific Railroad Company to Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions, of the Final Order Herein, Dated March 28, 1946

(3) Memorandum of The Western Pacific Railroad Corporation in Support of Petition for Clarification or Modification of the Injunctive Provisions of the Final Order Herein Dated March 28, 1946

(4) Respondent's Points and Authorities in Support of Its Answer and Return to Petition of The Western Pacific Railroad Corporation for Clarification or Modification of Final Order

(5) Order Denying Petition of The Western Pacific Railroad Corporation for Clarification or Modification of Order of March 28, 1946—dated October 29, 1948

(6) Notice—dated November 1, 1948 (Clerk's notice of order denying petition for clarification or modification.)

(7) Notice of Appeal—dated November 17, 1948

(8) Amended Notice of Appeal—dated November 29, 1948

(9) Stipulation and Order Extending Time—dated December 23, 1948

(10) Petition of The Western Pacific Railroad Company for an Order to Show Cause (including Bill of Complaint attached as Exhibit A)

(11) Order to The Western Pacific Railroad Corporation to Show Cause Why It Should not be

Adjudged Guilty of Contempt—dated August 30, 1946

(12) Answer and Return of The Western Pacific Railroad Corporation to Petition and to Order to Show Cause

(13) Reply of Petitioner, The Western Pacific Railroad Company, to Answer and Return of The Western Pacific Railroad Corporation to Petition and to Order to Show Cause

(14) Order Adjudging The Western Pacific Railroad Corporation Guilty of Contempt of the Final Order of This Court Herein—dated March 19, 1947

(15) Order—dated August 2, 1935 (Approving petition under Section 77 and authorizing debtor to operate property, pay claims incurred within six months, etc.)

(16) Order—dated August 20, 1935 (Fixing time for presentation of claims.)

(17) Order Appointing Trustees — dated September 23, 1935

(18) Order of Interstate Commerce Commission—dated June 21, 1939 (Order approving and setting forth plan of reorganization.)

(19) Order Approving Plan of Reorganization for Debtor—dated August 15, 1940

(20) Order Confirming Plan of Reorganization—dated October 11, 1943

(21) Order Making an Allowance to be Paid Out of Debtor's Estate for Certain Expenses Incurred and to be Incurred in Connection With the Proceedings and Plan of Reorganization by the

Reorganization Committee—dated October 23, 1944

(22) Order Directing the Revesting of Properties of the Debtor in the Debtor Company, Fixing the Date for Consummation of the Plan and Authorizing and Directing the Carrying Out of the Plan—dated November 27, 1944

(23) Order Approving and Confirming Ninth and Final Report and Accounting by the Trustees of the Property of the Debtor, Approving and Confirming Their Acts and Accounts, Discharging Them as Trustees and Exonerating Their Bonds—dated May 21, 1945

(24) Final Order—dated March 28, 1946

Dated the 14th day of January, 1949

/s/ LEROY R. GOORDICH

/s/ FRANK C. NICODEMUS, JR.

/s/ A. PERRY OSBORN

Attorneys for The Western Pacific
Railroad Corporation, Appellant

/s/ ALLAN P. MATTHEW

/s/ ROBERT L. LIPMAN

/s/ BURNHAM ENERSEN

Attorneys for The Western Pacific
Railroad Company, Appellee

[Endorsed]: Filed Jan. 17, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the original documents filed in this court in the above-entitled matter and that they constitute the record on appeal herein as designated by the parties.

Order approving petition under Section 77, filed August 2, 1935

Order fixing time for presentation of claims, filed August 20, 1935

Order appointing trustees, filed September 23, 1935

Report and order of the Interstate Commerce Commission, filed July 29, 1939

Order approving Plan of Reorganization for Debtor, filed August 15, 1940

Order confirming plan of reorganization, filed October 11, 1943

Order making allowance to be paid out of Debtor's estate for certain expenses, etc., filed October 23, 1944

Order directing the revesting of properties of the Debtor, etc., filed November 27, 1944

Order approving and confirming ninth and final report and accounting by the trustees, etc., filed May 21, 1945

Final order, filed March 28, 1946

Petition of the Western Pacific Railroad Com-

pany for an order to show cause, filed August 30, 1946

Order to the Western Pacific Railroad Corporation to show cause, filed August 30, 1946

Answer and return of the Western Pacific Railroad Corporation to order to show cause, filed September 23, 1946

Reply of petitioner to answer and return of the Western Pacific Railroad Corporation to order to show cause, filed October 2, 1946

Order adjudging the Western Pacific Railroad Corporation guilty of contempt of the final order, filed March 20, 1947

Petition of the Western Pacific Railroad Corporation for clarification or modification of the final order, filed September 30, 1947

Answer and return of the Western Pacific Railroad Company to petition for clarification, etc., filed September 15, 1948

Memorandum of the Western Pacific Railroad Corporation in support of petition for clarification, etc., filed October 25, 1948

Respondent's points and authorities in support of its answer and return to petition for clarification, etc., filed October 25, 1948

Order denying petition of the Western Pacific Railroad Corporation for clarification or modification of final order, filed October 29, 1948

Copy of notice sent to attorneys on above order (dated Nov. 1, 1948)

Notice of appeal, filed November 17, 1948

Amended Notice of appeal, filed November 29, 1948

Order extending time to file designation of record on appeal and Statement of points on which appellant intends to rely, filed December 23, 1948

Statement of points on which appellant will rely, filed January 17, 1949

Stipulation and order extending time to docket record on appeal, filed January 19, 1949

Stipulation for contents of record on appeal, filed January 17, 1949

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 20th day of January, 1949.

(Seal) C. W. CALBREATH,
Clerk

[Endorsed]: No. 12159. United States Court of Appeals for the Ninth Circuit. In the Matter of The Western Pacific Railroad Company, Debtor. The Western Pacific Railroad Corporation, Appellant, vs. The Western Pacific Railroad Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 20, 1949.

/s/ PAUL P. O'BRIEN
Clerk of the United States Court of Appeals
for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12159

In the Matter of THE WESTERN PACIFIC
RAILROAD COMPANY, Debtor
THE WESTERN PACIFIC RAILROAD
CORPORATION,

Appellant

vs.

THE WESTERN PACIFIC RAILROAD
COMPANY,

Appellee

STATEMENT OF POINTS

The appellant, The Western Pacific Railroad Corporation, hereby adopts as its points on appeal the Statement of Points appearing in the Transcript of the Record certified by the District Court on appeal herein.

Dated: January 25, 1949.

LEROY R. GOODRICH
FRANK C. NICODEMUS, JR.
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH
Attorneys for The Western Pacific Railroad
Corporation, Appellant

(Acknowledgment of Service.)

[Endorsed]: Filed January 26, 1949. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION DESIGNATING RECORD
FOR PRINTING

It is hereby stipulated by and between the appellant, The Western Pacific Railroad Corporation, and the appellee, The Western Pacific Railroad Company, that the said parties hereby designate for printing the entire record on appeal certified by the District Court on appeal, except and excluding the following:

(1) In the Report and Order of the Interstate Commerce Commission, dated June 21, 1939, omit the report portion thereof, consisting of the first fifty-two pages.

(2) In the Order Directing the Revesting of Properties of the Debtor in the Debtor Company, Fixing the Date for Consummation of the Plan and Authorizing and Directing the Carrying Out of the Plan, dated November 27, 1944, omit Exhibits A, B, C, E and F attached thereto.

(3) In the Answer and Return of The Western Pacific Railroad Company to Petition of The Western Pacific Railroad Corporation for Clarification or Modification of the Injunctive Provisions of the Final Order of the District Court, dated March 28,

1946, omit therefrom Exhibits A, B, C, D, E, and F.

Dated: January 25, 1949.

LEROY R. GOODRICH
FRANK C. NICODEMUS, JR.
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH
Attorneys for The Western Pacific
Railroad Corporation, Appellant
ALLAN P. MATTHEW
ROBERT L. LIPMAN
BURNHAM ENERSON

By /s/ ROBERT L. LIPMAN
Attorneys for The Western Pacific
Railroad Corporation, Appellant

[Endorsed]: Filed January 26, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION AND ORDER

The hereinafter enumeraed documents, certified to this Court by the District Court as a part of the record on appeal in the above entitled matter, are also a part of the printed record on appeal to this Court in Cause No. 9714 entitled:

In the Matter of The Western Pacific Railroad Company, Debtor.

The Western Pacific Railroad Corporation, a cor-

poration, The Western Pacific Railroad Company, a corporation, and Irving Trust Company, a corporation, as substituted trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company, A. C. James Co., a corporation, The Railroad Credit Corporation, a corporation, Appellants, vs. Institutional Bondholders Committee and Reconstruction Finance Corporation, Appellees.

The said cause as determined by this Court is reported in 124 Fed. (2d) 136, and as determined subsequently by the Supreme Court of the United States is reported in 318 U. S. 448.

The enumerated documents and their respective positions in the record in said cause, No. 9714, are:

(1) Order, dated August 2, 1935, signed by Judge St. Sure, appearing at page 11, Volume I of said record.

(4) Order of the Interstate Commerce Commission, in Finance Docket No. 10913, dated June 21, 1939, appearing at page 362 of said record.

(5) Order Approving Plan of Reorganization, dated August 15, 1940, signed by Judge St. Sure, appearing at page 1600 of said record.

The parties hereto stipulate and agree that the foregoing enumerated documents need not be reprinted in the matter now before the United States Court of Appeals, Cause No. 12159, but that this Stipulation and Order shall be printed in lieu thereof, and that any party to this appeal, as well

as this Court, may quote or refer to any of said documents as if printed as part of the record of this appeal.

Dated: February 9, 1949.

LEROY R. GOODRICH
FRANK C. NICODEMUS, JR.
A. PERRY OSBORN

By /s/ LEROY R. GOODRICH
Attorneys for The Western Pacific
Railroad Corporation, Appellant.

ALLAN P. MATTHEW
ROBERT L. LIPMAN
BURNHAM ENERSON

By /s/ ROBERT L. LIPMAN
Attorneys for The Western Pacific
Railroad Company, Appellee.

ORDER

It is so ordered.

/s/ WILLIAM DENMAN
Senior Circuit Judge

/s/ CLIFTON MATHEWS

/s/ WILLIAM HEALY
Judges U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed February 10, 1949. Paul P.
O'Brien, Clerk.

No. 12,159

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of
THE WESTERN PACIFIC RAILROAD
COMPANY,
Debtor.

THE WESTERN PACIFIC RAILROAD
CORPORATION,
Appellant,

vs.

THE WESTERN PACIFIC RAILROAD
COMPANY,
Appellee.

BRIEF FOR APPELLANT.

LEROY R. GOODRICH,
Central Bank Building, Fourteenth and Broadway,
Oakland 12, California,
Attorney for Appellant.

FRANK C. NICODEMUS, JR.,
44 Wall Street, New York 5, New York,
A. PERRY OSBORN,
20 Exchange Place, New York 5, New York,
Of Counsel.

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I.

The learned District Court erred in holding the Order made on March 19, 1947, by Judge A. F. St. Sure to constitute a bar to the filing and prosecution of the cause of action or causes of action alleged in the proposed Amended Bill of Complaint and in denying the plaintiff's petition (Tr. 252)	6
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A.

The Final Order or Decree of March 28, 1946, in the re-organization proceeding involving The Western Pacific Railroad Company expressly excepts from its injunctive provisions any cause of action against the respondent, The Western Pacific Railroad Company, growing out of interline accounts prior to August 2, 1935, and does not prohibit a derivative cause of action by the plaintiff on behalf of Sacramento Northern Railway against the respondent, The Western Pacific Railroad Company, to recover amounts due under just and equitable divisions of revenues from business interchanged prior to August 2, 1935 (Tr. 253)	6
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B.

The proposed Amended Bill of Complaint contains the following restrictive paragraph not appearing in the original Bill of Complaint considered by Judge St. Sure, under which the Amended Bill of Complaint, in so far as it sets forth a derivative cause of action in favor of Sacramento Northern Railway, expressly excludes any cause of action not falling within the exceptive provisions of the Final Order or Decree of March 28, 1946:

"Anything herein to the contrary notwithstanding this amended Bill of Complaint to the extent that it seeks a money judgment or decree in favor of Sacramento Northern Railway and against The Western Pacific Railroad Company in respect of the period prior to

December 31, 1944, is hereby limited to such amounts, if any, as are found due from The Western Pacific Railroad Company to Sacramento Northern Railway upon a judicial settlement of their inter-line accounts for the period prior to August 2, 1935, and are entitled to priority over the then existing mortgage indebtedness of the defendant, The Western Pacific Railroad Company, and to such amounts, if any, as are found to be due upon a judicial settlement of the inter-line accounts of Sacramento Northern Railway and the Trustees for the period August 2, 1935 to December 31, 1944, and payment of which is a liability of the defendant, The Western Pacific Railroad Company, under the Assumption Agreement executed pursuant to the Order of this Court dated November 27, 1944'' (Tr. 253-254)

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C.

The Assumption Agreement executed by the defendant, The Western Pacific Railroad Company, renders it liable in a derivative action in favor of Sacramento Northern Railway by this appellant to recover amounts due under just and equitable division of revenues from business interchanged with Thomas M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization, subsequent to August 2, 1935, and prior to December 31, 1944 (Tr. 254)

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D.

The Decree of March 28, 1946, and the Order made by Judge St. Sure on March 19, 1947, do not extend to or prohibit the prosecution by the plaintiff and appellant herein of a derivative cause of action against The Western Pacific Railroad Company to recover amounts due under just and equitable division of revenues from business interchanged subsequent to December 31, 1944 (Tr. 254)

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E.

The Final Order or Decree of March 28, 1946, and the Order of Judge St. Sure entered March 19, 1947, do

not prevent or purport to prevent the plaintiff and appellant, The Western Pacific Railroad Corporation, from joining in a suit properly instituted and pending against Sacramento Northern Railway, which was not a party to the reorganization proceeding, wherein said March 19, 1947 Order was entered, any proper or necessary party to a complete determination of such cause of action against Sacramento Northern Railway, even though such proper or necessary party happens to be the respondent, The Western Pacific Railroad Company, or any other party to said reorganization proceeding (Tr. 255)	23
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II.

The Final Order or Decree of March 18, 1946, should be liberally construed to permit the filing and prosecution of any legitimate lawsuit not within the spirit and intent of its restrictive provisions, in which category this proposed Amended Complaint indubitably falls; it being axiomatic that the doors of the court should be as wide open as the doors of a church	27
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No. 12,159

IN THE
United States Court of Appeals
For the Ninth Circuit

In the Matter of
THE WESTERN PACIFIC RAILROAD
COMPANY,
Debtor.

THE WESTERN PACIFIC RAILROAD
CORPORATION,
vs. *Appellant,*

THE WESTERN PACIFIC RAILROAD
COMPANY,
Appellee.

BRIEF FOR APPELLANT.

This is an appeal by The Western Pacific Railroad Corporation, Petitioner and Plaintiff below, herein referred to as Appellant, from an Order of the District Court signed by Judge Goodman and dated October 28, 1948, denying a Petition of the Appellant for an Order in the proceeding for the reorganization of The Western Pacific Railroad Company, Debtor, No. 26591-S. (Tr. 249-250.) The Appellant's petition asked

entry by the District Court of an Order (See Attachment A, Tr. pp. 193-195) designed to remove any reasonable doubt as to its right to file an Amended Bill of Complaint in the District Court in an action No. 26333-H originally entitled The Western Pacific Railroad Corporation, Plaintiff, against Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under the Indenture executed by Sacramento Northern Railroad (a predecessor company) as of July 1, 1918, as Defendants. (Tr. 151-152.)

The original Bill of Complaint in the last mentioned action, sought to establish a highly meritorious claim, undisputed save as it is sought to be defeated by a plea of limitation, which we deem abortive, against Sacramento Northern Railway in the amount of \$1,441,390.55 and to enforce payment thereof by the reorganized Western Pacific Railroad Company which had acquired under the reorganization all of the capital stock and various items of alleged indebtedness of said Sacramento Northern Railway. (Tr. 120-136; 186.)

By order of the late Judge A. F. St. Sure entered on March 19, 1947, in the above mentioned reorganization proceeding No. 26591-S the filing of the original Bill of Complaint by the Plaintiff against the above-named Defendants was held to violate the injunctive inhibitions of the Court Order entered in that proceeding on March 28, 1946. (Tr. 147.)

The circumstances under which Judge St. Sure's Order of March 19, 1947, had been entered in the reorganization proceeding and the reasons why the Appellant refrained from applying to Judge St. Sure for a rehearing or from appealing from his Order to this Court and why the Appellant deemed it more appropriate and more deferential to the Court to apply for leave to file an Amended Bill of Complaint are stated as follows in the Petition denied by the Court below:

“On March 19, 1947, an Order was signed by Judge St. Sure at his residence and was sent over to the Clerk of the Court for filing which adjudged the Petitioner to be in contempt; imposed as a penalty that the Petitioner pay to The Western Pacific Railroad Company ‘the full amount of all costs, counsel fees and damages paid, incurred or suffered by The Western Pacific Railroad Company on account of the commencing and maintaining of said action No. 26333-H against it’ and granted to the Petitioner the privilege of purging itself of such contempt by dismissing within fifteen days as against The Western Pacific Railroad Company its said action No. 26333-H.

“From the recitals in the Order signed by Judge St. Sure on March 19, 1947, it seemed obvious to Petitioner's counsel that he had misconceived the nature of the cause of action set forth in the Bill of Complaint in Action No. 26333-H, which had been carefully limited to be confined within the exceptive provisions of the Order of March 28, 1946, permitting commencement and maintenance of a suit against The Western Pa-

cific Railroad Company on any claim entitled to priority over its pre-reorganization mortgages.

“In this situation any one of three procedures was open to Petitioner—(a) a Petition for Rehearing before Judge St. Sure; (b) an appeal to the Circuit Court of Appeals; or (c) a dismissal of the Bill of Complaint as against The Western Pacific Railroad Company to be followed by the filing of an amended Bill of Complaint under the protection of an Order of Court.

“Counsel for the Petitioner were confident that Judge St. Sure would recognize that he had misconceived the case and would promptly set aside the Order on a Petition for Rehearing but that course was ruled out by his illness.

“There was a patent hazard in an appeal to the Circuit Court of Appeals. If such an appeal had been taken and lost the Petitioner might become liable for heavy counsel fees to be charged by counsel for The Western Pacific Railroad Company on the theory that they had rid it of a liability of \$1,441,390.55.

“So the Petitioner determined to dismiss the original Bill of Complaint as against The Western Pacific Railroad Company and thereafter to apply (as it is now doing) for a clarifying or modifying Order under the protection of which it could reimplead The Western Pacific Railroad Company under a new Bill of Complaint revised so as to be more clearly and definitely confined within limits of the exceptive provisions of the Order of March 28, 1946, and amended by superadding a derivative action in favor of the Sacramento Northern Railway and against The West-

ern Pacific Railroad Company which, if successful, would put Sacramento Northern Railway in funds necessary to discharge its indebtedness due the Petitioner."

Judge Goodman denied the Plaintiff's Petition by Order dated October 29, 1948, in the apparent belief as urged by the Defendants that he was concluded by Judge St. Sure's Order of March 19, 1947. (Tr. 217-224; 248)* The Appellant has appealed to this Court in the belief as advised by its Counsel that that is what Judge Goodman thought ought to be done and further that it should not unnecessarily risk another contempt proceeding in order to assert rights which they believe to be justiciable and not within the scope of, or cut off, barred or affected by the injunctive Order of March 28, 1946—all as is developed in the following:

*The remarks of Judge Goodman are not reproduced because Counsel for Defendants insisted (we think most unreasonably and erroneously) that what the Judge said from the bench is not a proper part of the Record on Appeal. The Appellant's Points had been drawn and filed below before that position had been taken by Defendants' Counsel and had been drawn upon the assumption (which we believe to be correct) that Judge Goodman exercised no independent judgment but, in view of a prior Order made by a co-ordinate Judge, had been led to believe that the matter should be sent to the Court of Appeals.

ARGUMENT.**I.**

THE LEARNED DISTRICT COURT ERRED IN HOLDING THE ORDER MADE ON MARCH 19, 1947, BY JUDGE A. F. ST. SURE TO CONSTITUTE A BAR TO THE FILING AND PROSECUTION OF THE CAUSE OF ACTION OR CAUSES OF ACTION ALLEGED IN THE PROPOSED AMENDED BILL OF COMPLAINT AND IN DENYING THE PLAINTIFF'S PETITION. (Tr. 252.)

Regardless of whether Judge Goodman, exercising an independent judgment, intended to decide the point stated in the foregoing headnote, it was a point strongly urged by the Appellee and which we deem erroneous for the reasons developed under the sub-captions lettered A to E as set out below:

A.

The Final Order or Decree of March 28, 1946, in the reorganization proceeding involving The Western Pacific Railroad Company expressly excepts from its injunctive provisions any cause of action against the respondent, The Western Pacific Railroad Company, growing out of interline accounts prior to August 2, 1935, and does not prohibit a derivative cause of action by the plaintiff on behalf of Sacramento Northern Railway against the respondent, The Western Pacific Railroad Company, to recover amounts due under just and equitable divisions of revenues from business interchanged prior to August 2, 1935. (Tr. 253.)

As shown above, the Appellant is asserting a claim against Sacramento Northern Railway, undisputed and uncontested (save as payment is sought to be avoided by a plea of limitation) in the amount of \$1,441,390.55 which represents principal and interest of the purchase money, or part of the purchase money, for valuable traffic-producing feeder-lines of

railroad acquired by Sacramento Northern Railway and which have been continuously operated by it during three separate operating periods for the benefit and enrichment of (a) the pre-reorganized Western Pacific Railroad Company; (b) the Section 77 Reorganization Trustees; and (c) the reorganized The Western Pacific Railroad Company. (Tr. 152-156.) Under these circumstances we think that this Court, guided by the wholesome rule enunciated by the Supreme Court of California in an identical case, will feel constrained to aid the Appellant in the vindication of its equities. The following is from the opinion of the Supreme Court of California in the case of *Booth v. Hoskins*, 75 Cal. 271:

“The whole case shows that Booth justly owed the defendant all the money claimed by him. It was by the use of the money loaned by defendant that Booth acquired the title to his property now of large value. Common honesty requires a debtor to pay his just debts if he is able to do so, and the Courts, when called upon, always enforce such payments if they can. The fact that a debt is barred by the Statute of Limitations in no way releases the debtor from his moral obligation to pay it. Moreover, one of the maxims which courts of equity should always act upon is, as suggested by the Court below, that he who seeks equity must do equity. In accordance with this maxim we think the plaintiff should be denied any affirmative relief until the money justly due to the defendant is paid.”

(For a statement of the facts see Tr. 184-185.)

For reasons that sufficiently appear in the proposed Amended Bill of Complaint, a judgment against Sacramento Northern Railway for \$1,441,390.55 may be wholly uncollectable unless the Sacramento Northern Railway can collect amounts aggregating that sum from the reorganized Western Pacific Railroad Company in an action (a) not barred by the Final Decree of March 28, 1946; or (b) upon a subsisting obligation assumed by the reorganized Western Pacific Railroad Company under the Assumption Agreement executed by Order of the reorganization Court; or (c) arising subsequent to the date of reorganization. (See Attachment B, Tr. 216.)

The Sacramento Northern Railway is a wholly-owned subsidiary of the Western Pacific Railroad Company and an integral part of the Western Pacific System, and has been such since 1928. Nevertheless, as a connecting carrier, interchanging traffic of all kinds with the Western Pacific Railroad Company, it has operated, in accordance with the provisions of the Interstate Commerce Act, as a separate and independent railroad (Tr. 152.) Such method of operation was pursued by the Western Pacific Railroad Company prior to August 2, 1935, and thereafter until the appointment of the Reorganization Trustees; the same form of operation was continued by the Trustees during the full period of the trusteeship and since the trusteeship ended has been pursued by the reorganized Western Pacific Railroad Company; but at *no* time during any of these three operating periods has there been an audit and judicial settlement of the inter-line

accounts of and between Sacramento Northern Railway and the Western Pacific Railroad Company and its Trustees. (Tr. 152.)

By clear mandate of the Interstate Commerce Act it was the duty of the Western Pacific Railroad Company prior to August 2, 1935; the duty of the Trustees subsequent to their appointment and prior to December 31, 1944;; and the duty of the reorganized Western Pacific Railroad Company at all times subsequent to December 31, 1944, to establish and maintain fair and equitable divisions in business interchanged with Sacramento Northern Railway to the end that it might discharge its lawful indebtedness including that due the Appellant.

Section 1 provides:

“It shall be the duty of every such common carrier (any carrier subject to this Act) establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; *and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.*” (49 U.S.C.A. Sec. 1.)

The authority of the Interstate Commerce Commission in respect of the division of through rates is well implemented by Section 15 (6):

“Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or

charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers and require adjustment to be made in accordance therewith." (49 U.S.C.A. Sec. 15 (6).)

That a good cause of action exists in favor of Sacramento Northern Railway against the Western Pacific Railroad Company cannot be gainsaid if, as is alleged in the Amended Bill of Complaint, the divisions of the rates on traffic interchanged between them have not been fair and equitable and compensatory to Sacramento Northern Railway. This, however, involves a factual inquiry and a readjustment of divisions committed to the Interstate Commerce Commission by the Interstate Commerce Act.* At one time

**Backus Brooks Company v. Northern Pacific Railway*, 21 Fed. (2d) 4.

there was a question whether such an inquiry and readjustment could be made retroactively but under a decision rendered by the Supreme Court of the United States on April 22, 1946, it is now clear that they may be so made.** The amended Bill of Complaint is drawn in contemplation of a reference to these special factual issues to the Interstate Commerce Commission precisely as special factual issues are referred to Special Masters in conformity with the usages of Chancery and to this end the Amended Bill of Complaint asks, *inter alia*—

“That the Plaintiff herein be authorized in the name of, or on behalf of the defendant, Sacramento Northern Railway, to apply to the Interstate Commerce Commission for any administrative or other relief under the amended Interstate Commerce Act which may be necessary or proper in connection with the establishment, both retrospectively and prospectively, of just and reasonable divisions of carrier revenues on business interchanged between Sacramento Northern Railway and the defendant, The Western Pacific Railroad Company, or in connection with a judicial settlement of their accounts.” (Tr. 216.)

The foregoing shows the nature of the claim in respect of which the Appellant as a creditor of Sacramento Northern Railway suing in its behalf seeks to implead the reorganized Western Pacific Railroad Company. Whether it will succeed in establishing such claim in its behalf is the issue to be determined in the proposed law suit.

***El Dorado Oil Works and El Dorado Terminal Company v. The United States of America, et al.*, 328 U.S. 12.

The question here and now presented is: is the law suit one that is or is not barred by the injunctive Order of March 28, 1946? Or, stating the question in even a narrower form—Is the proposed law suit one that may be brought as being within the exceptive provisions of the Order of March 28, 1946?

A discussion of this question is an appropriate, if not a necessary background of an intelligent consideration of the defense of *res adjudicata* upon which the Appellant seems to place great reliance.

At this point it will be in order to direct this Court's attention to the terms of the injunction which the Appellant was held to have violated in filing the original Bill of Complaint. This Order, which bears date March 28, 1946, provides in Paragraph 6 as follows, the italics emphasizing the exceptive provisions being our own:

“All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise against The Western Pacific Railroad Company, or against the successors or assigns of said Company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (*ex-*

cept as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (*except as specifically provided for or permitted by prior order of this Court*), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings."

Little more need be said about the injunctive Order of March 28, 1946; the exceptive clauses, which as set out above have been italicized, to be brought conspicuously to the attention of the Court, clearly contemplate and authorize the institution of suits to enforce against the reorganized Railroad Company any and all claims against said Railroad Company or its

Trustees, payment of which was specifically provided for or permitted by prior Orders of the Court by the Railroad Company or its Trustees out of the income of the trust estate.

The only remaining question is, therefore, were the Trustees authorized by appropriate Orders of Court to pay out of the impounded income of the trust estate claims "arising out of rate divisions" or "interline settlements".

In the Amended Bill of Complaint it is alleged that revenues derived by the Western Pacific Railroad Company from business interchanged with Sacramento Northern Railway approximate or exceed \$20,000,000 (Tr. 207-210.) Any part of that amount which may be recovered by Sacramento Northern Railway under the allegations of the Amended Bill of Complaint for the period *prior* to August 2, 1935, when the reorganization proceeding was commenced will be upon a claim "arising out of rate divisions" or "interline settlements" and would be a claim prior and preferential to mortgage liens resting upon the property of the Western Pacific Railroad Company on that date and would be a claim directed by Order of the Court dated August 2, 1935 (sometimes referred to as Order No. 1) to be paid out of current income "regardless of when accrued". (Tr. 5 (c).)

By subsequent Order of Court appointing the Trustees they were authorized and directed to conduct the business of the Western Pacific Railroad Company in its own corporate name and through its own corporate officers (but subject always to the direction of

the Trustees) and to exercise all of the powers, provisions, duties and obligations theretofore granted to and imposed upon the Western Pacific Railroad Company pursuant to Order No. 1 which as above set forth included express authority to pay "claims arising out of rate divisions" and "interline settlements" as well as other specified operating items "regardless of when accrued". (Tr. 5 (c); 20-21.)

These orders continued in full force and effect throughout the Trusteeship and thus were in effect and in contemplation when the Court made what is sometimes referred to as the Revesting Order dated November 27, 1944, under which the reorganized Western Pacific Railroad Company was required to execute the Assumption Agreement hereinbefore mentioned. (Tr. 74-99.)

Under the provisions of the Assumption Agreement exacted by the Court the reorganized the Western Pacific Railroad Company was required to assume and did

"Assume any and all outstanding current liabilities and obligations incurred by said Trustees and without limitation thereto, any and all liabilities or obligations of the debtor in possession of said Trustees with respect to claims for personal injury or death for loss or damage to property and generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustee, or their conduct of the debtor's business, including liabilities

and obligations hereafter arising up to midnight December 31, 1944.” (Tr. 101.)

It would serve no useful purpose to prolong the argument. The Amended Bill of Complaint not only alleges a cause of action that is clearly excepted from the injunctive provisions of the Order of March 28, 1949, but a cause of action which the Court expressly required the reorganized Western Pacific Railroad Company to assume as a part of the purchase price of the properties revested in it pursuant to the Plan of Reorganization.

B.

The proposed Amended Bill of Complaint contains the following restrictive paragraph not appearing in the original Bill of Complaint considered by Judge St. Sure, under which the Amended Bill of Complaint, in so far as it sets forth a derivative cause of action in favor of Sacramento Northern Railway, expressly excludes any cause of action not falling within the exceptive provisions of the Final Order or Decree of March 28, 1946:

“Anything herein to the contrary notwithstanding this amended Bill of Complaint to the extent that it seeks a money judgment or decree in favor of Sacramento Northern Railway and against The Western Pacific Railroad Company in respect of the period prior to December 31, 1944, is hereby limited to such amounts, if any, as are found due from The Western Pacific Railroad Company to Sacramento Northern Railway upon a judicial settlement of their inter-line accounts for the period prior to August 2, 1935, and are entitled to priority over the then existing mortgage indebtedness of the defendant, The Western Pacific Railroad Company, and to such amounts, if any, as are found to be due upon a judicial settlement of the inter-line accounts of Sacramento Northern Railway and the Trustees for the period August 2, 1935 to December 31, 1944, and payment of which is a liability of the defendant, The Western Pacific Railroad Company, under the Assumption Agreement executed pursuant to the Order of this Court dated November 27, 1944.” (Tr. 253-254.)

As to what led Judge St. Sure to the conclusion that the original Bill of Complaint ran counter to the injunctive provisions of the Order of March 28, 1946, we cannot know since he wrote no opinion. We conjecture, however, that he yielded to the Appellee's contention that the Appellant was seeking to enforce “an unsecured claim, not entitled to priority over any mortgage, when it accrued in 1928, as alleged in the Bill of Complaint and that as appears from the Bill

of Complaint, it continued to be an unsecured claim and not entitled to priority over any mortgage throughout the entire period of more than sixteen years from the date of its alleged accrual until the consummation of the reorganization of the Western Pacific Railroad Company.” (Tr. 146.)

That our conjecture is the correct one seems to be supported by the following recital in Judge St. Sure’s Order of March 19, 1947:

“That in and by said action The Western Pacific Railroad Corporation has asserted and now asserts a claim against the Petitioner which, if it exists at all, existed on or before December 28, 1944, and was released and discharged by said Final Order; *and that the commencement of said action is not and has not been provided for or permitted by any Order of this Court.*” (Tr. 149.)

Of course, Judge St. Sure was referring only to the Appellant’s claim against Sacramento Northern Railway and was not referring to any claim that Sacramento Northern Railway or any other connecting rail carrier might have against the reorganized Western Pacific Railroad Company “arising out of rate divisions” and “interline settlements” because claims of that character were expressly provided for and permitted by Paragraph (E) of the Order of Court entered August 2, 1935, “regardless of when accrued”. (Tr. 5.)

The Amended Bill of Complaint has been so drawn as to eliminate the objection that apparently was in the mind of Judge St. Sure and to set forth a deriva-

tive cause of action against the reorganized Western Pacific Railroad Company not in favor of the *Appellant* but in favor of Sacramento Northern Railway and a cause of action falling squarely within the exceptive provisions of the Order of March 28, 1946.

To avoid any possible question, however, as to the true nature of and the express limitations upon the cause of action intended to be alleged against the reorganized Western Pacific Railroad Company there was inserted in the Amended Bill of Complaint in addition to allegations fixing its character as a derivative cause of action the following provision:

“Anything herein to the contrary notwithstanding this amended Bill of Complaint to the extent that it seeks a money judgment or decree in favor of Sacramento Northern Railway and against The Western Pacific Railroad Company in respect of the period prior to December 31, 1944 is hereby limited to such amounts, if any, as are found due from The Western Pacific Railroad Company to Sacramento Northern Railway upon a judicial settlement of their inter-line accounts for the period prior to August 2, 1935, and are entitled to priority over the then existing mortgage indebtedness of the defendant, The Western Pacific Railroad Company, and to such amounts, if any, as are found to be due upon a judicial settlement of the inter-line accounts of Sacramento Northern Railway and the Trustees for the period August 2, 1935 to December 31, 1944, and payment of which is a liability of the defendant, The Western Pacific Railroad Company, under the Assumption Agreement executed

pursuant to the Order of this Court dated November 27, 1944.” (Tr. 212-213.)

Manifestly, this excludes from the Amended Bill of Complaint any allegation, or perhaps more correctly speaking sterilizes any allegation that could possibly be construed as violating the injunction. In its practical application it will eliminate accountability for unfair and inequitable divisions in any period prior to August 2, 1935 for which the claim would not be preferential. The Appellee argued before Judge St. Sure that the so-called six months rule would apply to this class of claims and there is some authority to support that contention although Judge St. Sure authorized payment of all such claims “regardless of when accrued.* (Tr. 5.) Whether claims of this character growing out of interchanged traffic are affected by the six months rule as contended by the Appellee or are preferential “regardless of when accrued”, as was the view of Judge St. Sure is a

*In 3 Jones on Bonds and Bond Securities, 4th Ed. Section 1356, page 145, it is stated: “The class of preferred debts to be so paid includes taxes on the property; the wages of officers and employees of every grade operating the road; the cost of material and supplies; * * * and balances due other railroads and lines of transportation on account of passenger tickets and freight charges.” Citing *Farmers Loan and Trust Company v. Vicksburg & M. R. Company*, 33 Fed. 778. And in the same volume, Section 1358, page 149, the author further says: “Under the principle just discussed is also included the payment of limited amounts due connecting roads for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations where an interruption of such relations could be a probable result in case of non-payment”, citing *Miltenberger v. Logansport Railway Company*, 106 U.S. 286; *Farmers Loan and Trust Company v. Vicksburg & M. R. Co.*, 33 Fed. 778; and *Easton v. Houston & T. C. Ry. Co.*, 38 Fed. 12.

question relating to the *merits* of the controversy and not in any sense whatever to the right of the Appellant to file an Amended Bill of Complaint for the settlement of the controversy.

C.

The Assumption Agreement executed by the defendant, The Western Pacific Railroad Company, renders it liable in a derivative action in favor of Sacramento Northern Railway by this appellant to recover amounts due under just and equitable division of revenues from business interchanged with Thomas M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization, subsequent to August 2, 1935, and prior to December 31, 1944. (Tr. 254.)

Attention already has been directed to the text of the Assumption Agreement which is the *nexus* of the right of the Appellant, suing for the account of Sacramento Northern Railway, to recover for it from the reorganized Western Pacific Railroad Company what may be justly and equitably due under readjusted divisions of revenues from business interchanged between the two carriers. It is hardly necessary to discuss the relationship or lack of relationship between the Assumption Agreement and the injunctive Order of March 22, 1946. The injunctive Order was the customary Order entered mainly for the purpose of protecting outgoing Trustees against litigation or claims discharged by the Bankruptcy proceeding and not to facilitate evasion by the reorganized Western Pacific Railroad Company of payment of just claims growing out of the operation of the railways by the Trustees. And it has been customary to require those who receive the assets from Receivers and Trustees to enter into Assumption Agreements whereby those

who have claims arising out of the acts of the Receivers or Trustees would be protected despite the discharge of the Receivers or Trustees from personal liability.

Texas and Pacific Railway Company v. Johnson, 151 U.S. 81;

Texas and Pacific Railway Company v. Bloom, 164 U.S. 636;

Glenn on Liquidation, Sec. 165, pp. 273, 274;

Clark on Receivers, Sec. 495, p. 677;

Hanlon v. Smith, 175 Fed. 192;

Stuart v. Dickinson, 235 S.W. 446 (Mo.);

Anderson v. Chicago, Rock Island and Pacific Railroad Company, 175 N.W. 583 (Iowa);
and

45 *Am. Jur.* 276, where in Sec. 345 the author states:

“Furthermore, a railroad company is liable for any claim which should have been paid by the receiver out of earnings of the railroad, although the claim is not established by intervention within the time fixed by the Order of the Court.”

D.

The Decree of March 28, 1946, and the Order made by Judge St. Sure on March 19, 1947, do not extend to or prohibit the prosecution by the plaintiff and appellant herein of a derivative cause of action against The Western Pacific Railroad Company to recover amounts due under just and equitable division of revenues from business interchanged subsequent to December 31, 1944. (Tr. 254.)

In addition to what may be found due Sacramento Northern Railway upon a retroactive adjustment of revenue divisions from business interchanged with the

Trustees prior to December 31, 1944, there will be further amounts due for the period subsequent to December 31, 1944, when the Trusteeship operations ended. Of course, neither the Decree of March 28, 1946, nor the Order of Judge St. Sure entered March 19, 1947, extends to or relates directly or indirectly to what accrued when operations were resumed by the reorganized Western Pacific Railroad Company. The Appellee has not yet had the hardihood to suggest that the injunctive Order was intended to freeze for the future the unlawful and inequitable divisions of revenue alleged to have been in effect during the period of trusteeship.

E.

The Final Order or Decree of March 28, 1946, and the Order of Judge St. Sure entered March 19, 1947, do not prevent or purport to prevent the plaintiff and appellant, The Western Pacific Railroad Corporation, from joining in a suit properly instituted and pending against Sacramento Northern Railway, which was not a party to the reorganization proceeding, wherein said March 19, 1947 Order was entered, any proper or necessary party to a complete determination of such cause of action against Sacramento Northern Railway, even though such proper or necessary party happens to be the respondent, The Western Pacific Railroad Company, or any other party to said reorganization proceeding. (Tr. 255.)

The Appellant's immediate objective is to require the reorganized Western Pacific Railroad Company to pay to Sacramento Northern Railway, its wholly-owned subsidiary, what may be due on a retroactive readjustment of divisions on railway traffic interchanged between the two Companies from the most recent practicable date to a date far enough back to

bring the reparations up to \$1,441,390.55 with interest from June 30, 1945. (Tr. 180.)

There is a possibility (perhaps a remote one) that reparations up to that amount may be awarded by the Interstate Commerce Commission on business in the third operating period; that is, business transacted by the reorganized Western Pacific Railroad Company after January 1, 1945, in which event it will not be necessary to go back to the period of trusteeship operation which ended December 31, 1944; and there is a further possibility—perhaps even a probability—that reparations awarded for any shortage attributable to the period subsequent to January 1, 1945, will be made up on business transacted in the period of trusteeship or some part thereof. But if in order to secure full satisfaction it be necessary for the Appellant to go back of both of these periods into the period antedating the filing of the petition in bankruptcy on August 2, 1935, the Appellant contends that this period is open for reparations notwithstanding the final Order of March 28, 1946, and notwithstanding any statute of limitations.* If by the above process sufficient money can be put into the treasury of Sacramento Northern Railway to satisfy the Appellant's claim, then a judicial question will arise as to whether the indebtedness which the Appellee claims is due to it from Sacramento Northern Railway aggregating more than \$22,964,324 must not

*The reason why the Order of March 28, 1946, is inapplicable has been fully developed; the reason why the Statute of Limitations is inapplicable is that inter-line settlements are running accounts with day to day entries.

in equity and good conscience be subordinated to the Appellant's claim in the amount of \$1,441,390.55, with interest from June 30, 1945, so that the full amount of the debt due the Appellant by Sacramento Northern Railway may be paid over by it to the Appellant.*

Should, however, the Appellant fail to establish in favor of Sacramento Northern Railway a claim for all or any part of the amount so alleged to be recoverable by it, that is to say, should the derivative cause of action alleged in the Amended Bill of Complaint in favor of Sacramento Northern Railway and against the reorganized Western Pacific Railroad Company or any part thereof fail; and as a consequence of such failure should the Appellant be obliged to resort to a judicial sale of the property of Sacramento Northern Railway which is encumbered by liens held by the reorganized Western Pacific Railroad Company a like question will arise with respect to the proceeds of such a sale: a question whether in equity and good conscience the indebtedness held against Sacramento Northern Railway by the reorganized Western Pacific Railroad Company must not be subordinated to the Appellant's claim in the amount of \$1,441,390.55, with interest from June 30, 1945.

In this connection it is important that this Court understand that Sacramento Northern Railway was not a party to the reorganization proceeding No.

*The Appellant contends that this indebtedness if valid is a contribution of capital to a stock owned subsidiary; such indebtedness ranks on a parity with such stock and is subordinate to third party owned indebtedness.

26591-S. All that the reorganized Western Pacific Railroad Company acquired under the so-called Revestment Order respecting Sacramento Northern Railway was (a) its capital stock; (b) most but not all of its First Mortgage Bonds outstanding in the amount of \$5,312,475; and (c) all of its unsecured indebtedness except that part thereof held by the Appellant and amounting as of June 30, 1945, to \$1,441,390.55. (Tr. 186.)

Of course, the reorganized Western Pacific Railroad Company acquired all of these various claims against Sacramento Northern Railway subject to existing equities of third parties and it goes without saying that the Appellant and any other party having a claim against Sacramento Northern Railway cannot enforce these equities unless it can implead the reorganized The Western Pacific Railroad Company. The Western Pacific Railroad Company is a necessary party to any proceeding in which the holders of indebtedness against Sacramento Northern Railway seek to enforce that indebtedness against its funds or its property in priority to like claims held by the reorganized Western Pacific Railroad Company.

The injunctive provisions of the Order of March 28, 1946, in No. 26591-S, do not purport to bar the joinder of the reorganized Western Pacific Railroad Company in a suit of that character; and, we submit, if the Reorganization Court had undertaken to interfere with such a proceeding against Sacramento Northern Railway, which was not a party to the re-

organization proceeding, by enjoining joinder of a necessary party its action would have been void as beyond the Bankruptcy Court's jurisdiction, which extends only to "the debtor and its property". (Title 11, U.S.C.A. Sec. 205(a). The reorganized Western Pacific Railroad Company is in no different or better position respecting its rights and claims against Sacramento Northern Railway than was the pre-reorganized Western Pacific Railroad Company in whose shoes it stands. (*Thompson v. Terminal Shares, Inc.*, 104 F. 2d 1 (8 Cir. cert. den. 308 U.S. 559); *Callaway v. Benton*, 336 U.S. 132. Standing in the shoes of the pre-reorganized Railroad Company the Appellee may not lift itself up by its own boot straps in defiance of natural law.

II.

THE FINAL ORDER OR DECREE OF MARCH 18, 1946, SHOULD BE LIBERALLY CONSTRUED TO PERMIT THE FILING AND PROSECUTION OF ANY LEGITIMATE LAWSUIT NOT WITHIN THE SPIRIT AND INTENT OF ITS RESTRICTIVE PROVISIONS, IN WHICH CATEGORY THIS PROPOSED AMENDED COMPLAINT INDUBITABLY FALLS; IT BEING AXIOMATIC THAT THE DOORS OF THE COURT SHOULD BE AS WIDE OPEN AS THE DOORS OF A CHURCH.

It is not disputed that the Appellant has a valid and enforceable claim against Sacramento Northern Railway for \$1,441,390.55, with interest from June 30, 1945, unless, as is asserted by the Appellee, the claim is barred by Limitations. The original Bill of Com-

26591-S. All that the reorganized Western Pacific Railroad Company acquired under the so-called Revestment Order respecting Sacramento Northern Railway was (a) its capital stock; (b) most but not all of its First Mortgage Bonds outstanding in the amount of \$5,312,475; and (c) all of its unsecured indebtedness except that part thereof held by the Appellant and amounting as of June 30, 1945, to \$1,441,390.55. (Tr. 186.)

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The injunctive provisions of the Order of March 28, 1946, in No. 26591-S, do not purport to bar the joinder of the reorganized Western Pacific Railroad Company in a suit of that character; and, we submit, if the Reorganization Court had undertaken to interfere with such a proceeding against Sacramento Northern Railway, which was not a party to the re-

organization proceeding, by enjoining joinder of a necessary party its action would have been void as beyond the Bankruptcy Court's jurisdiction, which extends only to "the debtor and its property". (Title 11, U.S.C.A. Sec. 205(a). The reorganized Western Pacific Railroad Company is in no different or better position respecting its rights and claims against Sacramento Northern Railway than was the pre-reorganized Western Pacific Railroad Company in whose shoes it stands. (*Thompson v. Terminal Shares, Inc.*, 104 F. 2d 1 (8 Cir. cert. den. 308 U.S. 559); *Callaway v. Benton*, 336 U.S. 132. Standing in the shoes of the pre-reorganized Railroad Company the Appellee may not lift itself up by its own boot straps in defiance of natural law.

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It is not disputed that the Appellant has a valid and enforceable claim against Sacramento Northern Railway for \$1,441,390.55, with interest from June 30, 1945, unless, as is asserted by the Appellee, the claim is barred by Limitations. The original Bill of Com-

plaint as well as the Amended Bill of Complaint alleges facts sufficient to toll Limitations.*

This indebtedness represents the purchase price of property acquired by Sacramento Northern Railway for which payment has not been made, but which the reorganized Western Pacific Railroad Company through its ownership of capital stock of Sacramento Northern Railway is using for its own enrichment.**

Under the doctrine of *Booth v. Hoskins*, 75 Cal. 271 the reorganized Western Pacific Railroad Company will not be accorded equitable relief to which other-

*On or about February 14, 1933, Sacramento Northern Railway filed with The Railroad Credit Corporation to induce it to make a loan to the pre-organized The Western Pacific Railroad Company a certificate verified by its Auditor certifying that: "There is now owing to The Western Pacific Railroad Corporation from Sacramento Northern Railway the sum of \$856,260 in an open book account." From time to time thereafter the Sacramento Northern Railway filed or caused to be filed in each year up to and including at least the year 1944 with the Interstate Commerce Commission and with the federal Commissioner of Internal Revenue properly authenticated financial statements in which said indebtedness was shown as subsisting indebtedness and upon which interest accruals were made in favor of the Petitioner.

**For more than 15 years the defendant, The Western Pacific Railroad Company, has retained all of such revenues without being asked to account to Sacramento Northern Railway for any part thereof so as to provide it with funds for the repayment of the advances made to it by the plaintiff. In such an accounting the defendant, The Western Pacific Railroad Company, as the result of judicial and administrative decisions which stem back to the case of *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U.S. 649, 665, will not be permitted to apply its over-all operating ratio to the business interchanged with its subsidiary, the defendant, Sacramento Northern Railway, but will be accountable to it for all of the revenue derived from the full line haul except the out-of-pocket operating cost applicable thereto. The exact amount of such revenues is unknown and could only be determined as the result of an intricate accounting but the plaintiff alleges that the amount of such revenues approximates or exceeds \$20,000,000.

wise it might be entitled until it causes its subsidiary, Sacramento Northern Railway, to observe the dictates of "common honesty" by paying this debt.

The reorganized Western Pacific Railroad Company not only declines to perform this simple act of common honesty but seeks to avoid being required to do so by invoking the injunctive provisions of the final Order or Decree of March 28, 1946, rendered in a proceeding to which Sacramento Northern Railway was not a party and which did not involve the determination of any issue between it and its subsidiary. If a determination of alleged issues between it and Sacramento Northern Railway will put into the treasury of Sacramento Northern Railway moneys with which it may pay its just debt to the Appellant, a result will be achieved which it was not the spirit and intent of the injunctive Order or Decree of March 28, 1946, to interdict; otherwise, *Booth v. Hoskins* is meaningless.

But if, due to the broad language of the Order of March 28, 1946, the proposed Amended Bill of Complaint appears to be prohibited, it is a part of the inherent power of the Court to whom the enforcement of that Order is committed to limit its application in furtherance of justice, because, as stated in the foregoing headnote the doors of the Court should be as wide open as the doors of a church.

Accordingly, the Appellant asks that this cause be remitted to the District Court with directions to enter an Order substantially in the form of Attachment A

to the Appellant's Supporting Memorandum. (Tr. 179; 193-195.)

All of which is respectfully submitted.

Dated, Oakland, California,
May 6, 1949.

LEROY R. GOODRICH,
Attorney for Appellant.

FRANK C. NICODEMUS, JR.,
A. PERRY OSBORN,
Of Counsel.

No. 12,159

IN THE

United States
Court of Appeals

For the Ninth Circuit

In the Matter of

THE WESTERN PACIFIC RAILROAD COM-
PANY,

Debtor.

THE WESTERN PACIFIC RAILROAD CORPO-
RATION,

Appellant,

vs.

THE WESTERN PACIFIC RAILROAD COM-
PANY,

Appellee.

Brief for Appellee

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Dated: San Francisco, California,

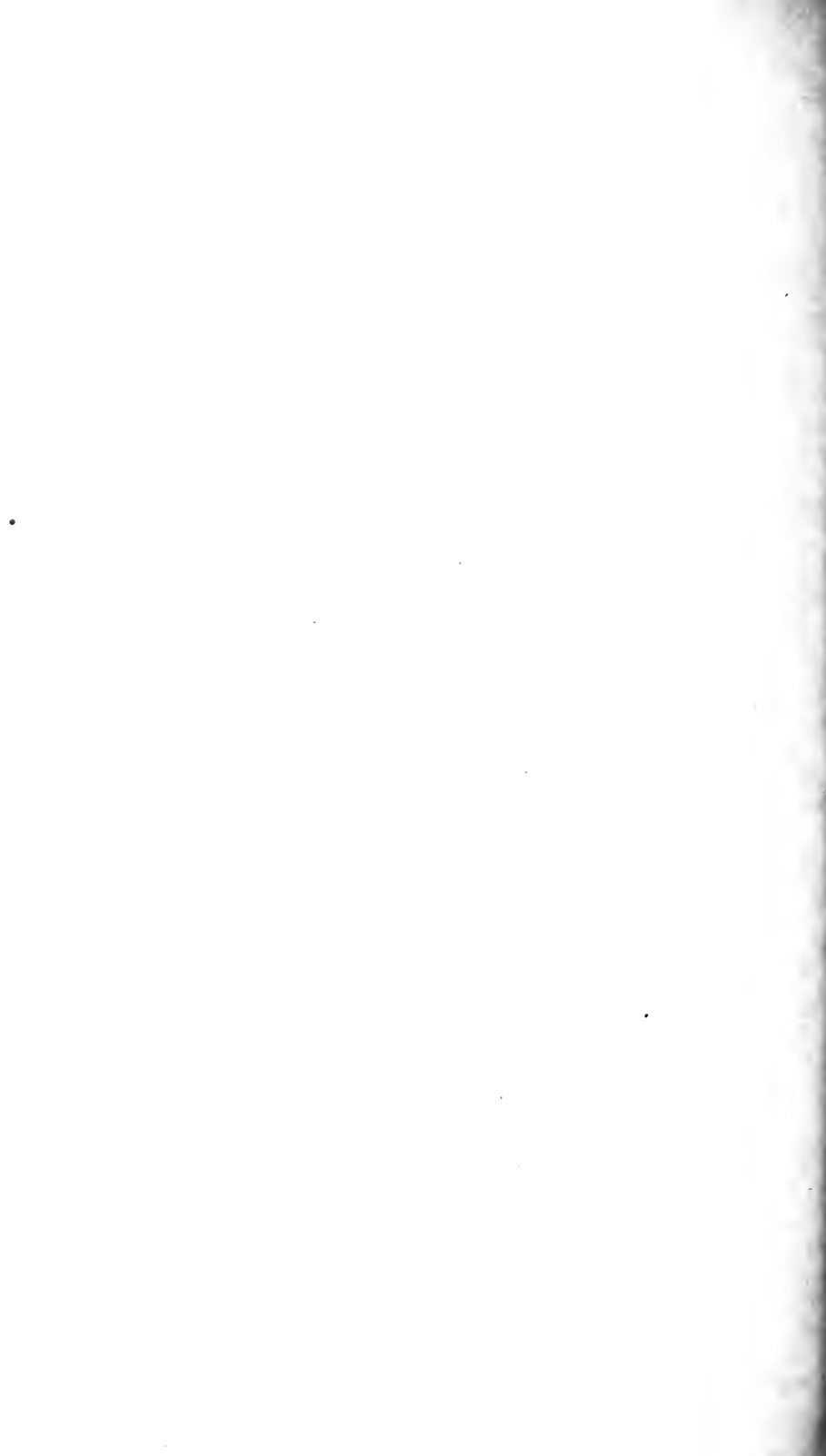
June 16, 1949.

FILED

JUN 16 1949

PAUL P. O'BRIEN,

CLERK



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Brief for Appellee

INTRODUCTORY

This is an appeal from an order of the United States District Court for the Northern District of California, Southern Division, in a railroad reorganization proceeding under Section 77 of the Bankruptcy Act, denying Appellant's petition for a "clarification" or, in the alternative, a "modification" of the injunctive provisions of the Court's Final Order in the reorganization case (Tr. 108) whereby the proceeding was terminated and the case closed (Tr. 115). Appellant sought such "clarification" or

"modification" for the declared purpose of permitting Appellant (Tr. 151, 156) "to institute a suit against, or to reform a suit heretofore instituted against," the reorganized railroad company, the Appellee herein, upon a claim that existed, if it existed at all, prior to the consummation of reorganization by the revestment of the railroad properties in the reorganized company on December 29, 1944 and prior to the Final Order of March 28, 1946. The bankruptcy court had previously held, by an order from which no appeal was taken (Tr. 149), that the claim asserted by Appellant "was released and discharged by said Final Order."

By its petition, denied by the court below, the Appellant prayed for relief from the injunctive provisions of the Final Order, avowedly to avoid being adjudged guilty of contempt in bringing its proposed suit. In its essence Appellant's contention here is that the bankruptcy court erred in refusing to modify its Final Order so as to permit Appellant to institute its belated suit upon a discharged and barred claim. Not only is the appeal devoid of merit but, in the view of the Appellee, the order sought to be reviewed is a non-appealable order. This will be shown. It will also be shown, *inter alia*, (1) that the claim upon which Appellant proposed to institute suit had been released and discharged by the Final Order in the bankruptcy proceeding and (2) that it had been conclusively so determined by a prior order of the bankruptcy court adjudging the Appellant guilty of contempt in having instituted such a suit.*

THE FACTS

(1) The Parties.

The Western Pacific Railroad Corporation, Appellant herein, is a holding corporation which formerly owned all of the stock

*In a footnote on page 5 of its brief Appellant affects to be aggrieved because Judge Goodman's remarks made upon the argument of the cause before him have not been reproduced in this record. Under the rules Appellant was free to designate whatever it desired for inclusion in the record (Rule 75, Rules of Civil Procedure) and was under no compulsion to join with Appellee in a "Stipulation for Record on Appeal" (Tr. 257).

of The Western Pacific Railroad Company, an operating rail carrier whose main line of railway extended from San Francisco to Salt Lake City. The latter company, in turn, owned all of the stock and substantially all of the bonds of Sacramento Northern Railway, likewise an operating rail carrier, with lines of railway extending from San Francisco to Sacramento and other points in the Sacramento Valley. Thus the Appellant controlled the two rail carriers.

The reorganized The Western Pacific Railroad Company is the Appellee herein.

(2) Events of Western Pacific Reorganization.

On August 2, 1935, The Western Pacific Railroad Company filed its petition for reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the Northern District of California. Upon that same date the petition was approved as properly filed (Tr. 2). Reorganization trustees were shortly appointed and the railroad properties were under judicial administration for a period of more than nine years, terminating on December 29, 1944, when the properties were revested by order of the bankruptcy court in the reorganized The Western Pacific Railroad Company (Tr. 74, 88). This revestment was accomplished pursuant to a plan of reorganization prescribed by the Interstate Commerce Commission, 233 I.C.C. 409 (June 21, 1939) (Tr. 22), upheld by the Supreme Court of the United States, 318 U.S. 448 (March 15, 1943), and confirmed by the bankruptcy court (October 11, 1943) (Tr. 65). Under the provisions of the plan of reorganization the stock of The Western Pacific Railroad Company, all of which was owned by Appellant as above stated, was determined to be worthless and was required to be cancelled (Tr. 52, 53). All unsecured claims, including those filed by the Appellant, were likewise determined to be without value (Tr. 51-52). Thus the Appellant, though a party to the reorganization proceeding as sole stockholder and as an unsecured creditor, was denied participation in the reorganized company. The secured creditors only, viz., the Reconstruction

Finance Corporation, Railroad Credit Corporation, the First Mortgage Bondholders and the A. C. James Company, were permitted to participate in the reorganization, and bonds and stock of the reorganized company were issued to the secured creditors in conformity with the provisions of the plan (Tr. 50-51). Likewise as permitted by the plan, the old corporate charter was retained but all of the original bonds and stock were cancelled, being superseded by the bonds and stock issued by the reorganized company.

The stock and bonds of Sacramento Northern Railway, held by The Western Pacific Railroad Company as previously stated, were pledged as additional security under the new bond mortgages of The Western Pacific Railroad Company as reorganized (Tr. 24, 32).

After the consummation of reorganization by revestment of the railroad properties in the reorganized company on December 29, 1944, the reorganization proceeding was kept open until March 28, 1946, when the Final Order was made by the bankruptcy court terminating the proceeding and closing the case (Tr. 108, 111-12). This order included comprehensive provisions perpetually enjoining all persons "from instituting * * * any suit * * * against The Western Pacific Railroad Company, * * * directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), * * * and from interfering with * * * said company * * * by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court) * * *" (Tr. 111-12). There was no appeal from the Final Order.

(3) Appellant's Prior Suit; Contempt Proceeding.

On August 24, 1946, Appellant brought suit in the United States District Court for the Northern District of California against Sacramento Northern Railway and the reorganized The Western Pacific Railroad Company, the Appellee herein, seeking judgment for the recovery of advances made by Appellant to Sacramento Northern Railway in 1928, or approximately eighteen years prior to the institution of the suit (Tr. 120). Such advances, together with unpaid interest accruals, were alleged to amount to \$1,441,390.55. The alleged indebtedness was at no time an indebtedness of The Western Pacific Railroad Company. Nevertheless, the reorganized company was joined as a defendant for the purpose of asserting a so-called derivative claim in the right of Sacramento Northern Railway for a "retroactive readjustment" of divisions of rates on traffic interchanged between the two carriers and, based upon such retroactive readjustment, a determination of amounts retroactively payable to Sacramento Northern Railway. A money judgment was sought against the reorganized Western Pacific, in the alleged right of Sacramento Northern Railway but for the benefit of Appellant.

On August 30, 1946 an order was entered by the bankruptcy court, upon petition of Appellee, requiring Appellant to show cause why it should not be adjudged guilty of contempt for violation of the Final Order by instituting its action (Tr. 136). Appellant thereupon filed its Answer and Return to the order to show cause (Tr. 137) contending that its action was not in contempt of the Final Order because the alleged cause of action asserted derivatively against the reorganized company was entitled to priority over the mortgages of the reorganized company and was therefore excepted from the Final Order. To this Answer and Return the reorganized company (the Appellee herein) replied (Tr. 144), and the matter was briefed and submitted (Tr. 148). The bankruptcy court determined the issues adversely to Appellant by an order dated March 19, 1947, wherein the Court found and concluded (Tr. 149):

- (a) that the claim asserted by Appellant against the reorganized company was one which, if it existed at all, existed on and before December 28, 1944 "*and was released and discharged by said Final Order*";*
- (b) "*that the assertion of such a claim was and is barred and enjoined by said Final Order*";
- (c) "*that the commencement of said action is not and has not been provided for or permitted by any order of this Court*"; and
- (d) that "in commencing and ⁱⁿ maintaining said action" the Appellant had violated and was "guilty of contempt of said Final Order * * *."

The Court's order adjudged Appellant to be in contempt of the Court but provided that the Appellant might purge itself of its contempt by dismissing its suit as to the reorganized company. Appellant did not seek rehearing, neither did it appeal from the bankruptcy court's order of March 19, 1947 adjudging the Appellant in contempt (App.'s Br. 4). The order was allowed to become final. Appellant elected to purge itself of contempt by dismissing its action as to The Western Pacific Railroad Company (App.'s Br. 4). Its notice of dismissal, dated April 18, 1947, is in the record (Tr. 177).

(4) Appellant's Petition for "Clarification or Modification" of Final Order.

On September 30, 1947 Appellant filed a petition in the bankruptcy court for "clarification or modification" of the Final Order in the reorganization proceeding so as to permit Appellant to institute suit against the reorganized Western Pacific or to reform the suit previously instituted (Tr. 151). On October 29, 1948 the bankruptcy court made its order denying Appellant's petition (Tr. 248). From this order the Appellant has appealed.

It remains only to add that the claim which Appellant asserted in the suit held by Judge St. Sure's order of March 19, 1947 to

*All emphasis throughout this brief is supplied, unless otherwise expressly noted.

have been contemptuous, this being the same claim which Appellant proposes to assert in its contemplated suit provided that the Final Order should be modified so as to permit suit to be brought, was at no time presented to the bankruptcy court during the reorganization proceeding, which was open for a period of more than ten and one-half years extending from August 2, 1935 to March 28, 1946.

(5) Chronology.

The following chronology will be helpful:

- Aug. 2, 1935 Order of bankruptcy court approving petition for reorganization as filed (Tr. 2).
- Nov. 27, 1944 Order of bankruptcy court directing the revesting of the debtor's properties in the reorganized company and fixing December 29, 1944 as the date for the consummation of the plan of reorganization (Tr. 74, 88).
- Dec. 29, 1944 Reorganization plan consummated by revestment of railroad properties in reorganized company.
- Mar. 28, 1946 Final order of bankruptcy court terminating the proceedings and closing the case and enjoining the institution of any suit against the reorganized company on account of any right, claims or interest which may have existed on or before December 28, 1944 "(except as specifically provided for or permitted by prior order of this Court)" (Tr. 108, 111-12).
- Aug. 24, 1946 Institution of suit by Appellant against Sacramento Northern Railway and the reorganized The Western Pacific Railroad Company seeking judgment against the latter, in the right of Sacramento Northern Railway, upon an alleged claim for a retroactive adjustment of divisions of rates (Tr. 120).
- Aug. 30, 1946 Order of bankruptcy court requiring Appellant to show cause why it should not be adjudged guilty of contempt (Tr. 136).

- Mar. 19, 1947 Order of bankruptcy court adjudging Appellant to be in contempt of the Final Order of the bankruptcy court by reason of the institution of its suit against the reorganized The Western Pacific Railroad Company (Tr. 147).
- Apr. 18, 1947 Appellant's notice of dismissal of suit as to The Western Pacific Railroad Company (Tr. 177).
- Sept. 30, 1947 Petition by Appellant to bankruptcy court for clarification or modification of Final Order so as to permit Appellant to institute suit against The Western Pacific Railroad Company or to reform the suit previously instituted (Tr. 151).
- Oct. 29, 1948 Order of bankruptcy court denying Appellant's petition for clarification or modification of Final Order (Tr. 248).

THE CASE TENDERED BY APPELLANT'S PETITION AND PROPOSED SUIT

(1) Objective Sought by Appellant's Petition.

On its own statement Appellant has no direct claim against Appellee, the reorganized The Western Pacific Railroad Company (App.'s Br. 18-19). Appellant represents that it has a valid claim against Sacramento Northern Railway, a wholly controlled subsidiary of the Appellee, for advances made to Sacramento Northern Railway in 1928, over twenty years ago, together with interest to date on the amount remaining unpaid (Tr. 199); that this amount is wholly uncollectible in fact from the Sacramento Northern Railway unless the latter has an enforceable claim against Appellee, the reorganized railway company, based upon a demand for "a retroactive adjustment" of the divisions of rates on traffic interchanged between Sacramento Northern Railway and The Western Pacific Railroad Company, now reorganized (App.'s Br. 8; Tr. 151, 155); that the claim thus asserted exists not only for "the post-reorganization period," i.e., the period subsequent to the revestment of

the railroad properties in the reorganized railroad company on December 29, 1944, but also for "the full period of judicial operation," i.e., from August 2, 1935 to December 28, 1944, and even for the period prior to August 2, 1935, when the debtor's petition for reorganization was filed (Tr. 156; App.'s Br. 23, 24); that Appellant, although it has not reduced its asserted claim against Sacramento Northern Railway to judgment, may nevertheless institute a derivative suit against the reorganized company, not in Appellant's own right but in the alleged right of Sacramento Northern Railway (App.'s Br. 18, 19), to recover on a supposed claim for a "retroactive adjustment" of divisions of rates; that by attempting to assert such a claim against the reorganized company Appellant runs the risk of being adjudged in contempt of the injunctive provisions of the Final Order of the bankruptcy court barring and enjoining the assertion of such claims (Tr. 152); that Appellant was entitled, as of right, to have the Final Order of the bankruptcy court "clarified"—i.e., construed—so as to permit the assertion of the alleged derivative claim against the reorganized company or, if such Final Order bars and enjoins the assertion thereof, to have it so "modified" as to authorize the suit which Appellant seeks leave to institute or reform (Tr. 156, 195; App.'s Br. 5); and that the bankruptcy court erred in denying Appellant the relief sought by its petition.

The issue tendered by Appellant's petition to the court below was whether Appellant was free to sue the reorganized The Western Pacific Railroad Company in a derivative cause of action in the alleged right of Sacramento Northern Railway upon a supposed claim for a retroactive adjustment of divisions of rates on traffic interchanged between the two carriers prior to the consummation of the Western Pacific reorganization, i.e., during the period of judicial operation as well as the period prior thereto. This same issue had previously been raised by Appellant and determined adversely to it by the bankruptcy court in the contempt proceeding. From this determination no appeal was taken (App.'s Br. 4) and that adjudication has accordingly long since become final.

(2) Identity of Cause of Action in Proposed Suit with Cause of Action in Suit Held to Have Been Contemptuous.

The suit instituted by Appellant on or about August 24, 1946 (Tr. 118, 138) and held to be contemptuous was upon the identical cause of action upon which Appellant now seeks leave to sue. The complaint in that action (Tr. 120), in common with the complaint tendered with Appellant's present petition (Tr. 197), alleged that Sacramento Northern Railway was indebted to Appellant for advances and interest thereon (Tr. 121, 127, 199, 204); both the original complaint and the proposed complaint, while professing to assert that Appellant's claim is paramount to the bond mortgages on the Sacramento Northern Railway's properties (Tr. 128, 205), seek to reach in equity what is said to be a claim of Sacramento Northern Railway against the reorganized company for a retroactive adjustment of divisions of rates on business interchanged between the two railroads, and Appellant's contention upon the present appeal (App.'s Br. Point I), in common with its contention in the previous case (Tr. 138), is that the claim which Appellant seeks to assert derivatively against the reorganized company is not within the injunctive provisions of the Final Order.

Although Appellant would have it appear otherwise (App.'s Br. 17-21), there is not the slightest difference in substance between the allegations of the original complaint which was held to have been contemptuous and the allegations of the proposed amended complaint. Both complaints involve exactly the same claim and are referable to precisely the same period of time. Appellant asserts (App.'s Br. 18-19) that the proposed amended complaint is different from the original in that it sets forth "a derivative cause of action against the reorganized Western Pacific Railroad Company not in favor of the *Appellant* but in favor of Sacramento Northern Railway * * *". (The emphasis is Appellant's.) The fact is that the complaints are alike in this respect also, for Paragraph 2 of the prayer of each complaint asks for a money judgment against Appellee and in

favor of Sacramento Northern Railway for the benefit of Appellant (Original Complaint, Tr. 135; Proposed Amended Complaint, Tr. 215). Appellant also relies upon the interpolation of the so-called "restrictive paragraph" in the proposed amended complaint (Tr. 212-13) but that paragraph does not change the nature or substance of the alleged cause of action by one iota. The supposed "restrictions" contained in this paragraph are two in number: First, as to the period prior to August 2, 1935, Appellant "restricts" itself to such amounts as "are entitled to priority over the then existing mortgage indebtedness of the defendant, The Western Pacific Railroad Company." This is but a paraphrase of the allegation in Paragraph VIII of the original complaint (Tr. 127) to the effect that the Appellant's claim is a first lien upon the revenues derived by the Appellee from traffic originating upon the Sacramento Northern Railway "to the extent that the plaintiff's claim against such revenues is entitled to priorities over the mortgages of the defendant, The Western Pacific Railroad Company." Second, as to the reorganization period from August 2, 1935 to December 1, 1944, the new paragraph "restricts" the claim to the amounts which have been assumed by the reorganized company (the Appellee) under the Assumption Agreement executed pursuant to the order of the reorganization Court. But this is precisely the same description which the Appellant itself gave to its original complaint in so far as it related to the period of the trusteeship. In its "Rejoinder" filed October 11, 1946, in connection with the contempt proceedings, Appellant said, "Clearly the injunction is inapplicable either by its terms or its intent to liabilities which arose out of the trusteeship operations and which the reorganized Railroad Company was required to assume by the order of this Court entered November 27, 1944. * * *

All liabilities growing out of the traffic relations between these two properties were directly assumed by the Railroad Company under paragraph 2 of the Assumption Agreement of December 14, 1944. It would be strange indeed for this Court to punish

as a contempt the filing of a suit to enforce against the Railroad Company liabilities which the Court required the Railroad Company to assume." Therefore, the so-called "restrictive" paragraph in fact is not restrictive at all—it is merely repetitive. It does no more than restate in different words the content of the claim asserted by Appellant in its original complaint, which was held to be contemptuous.

Appellant is here attempting to relitigate the precise issue which was determined adversely to Appellant by Judge St. Sure's order in the contempt proceeding. In form Appellant's petition prayed for a "clarification or modification" of the Final Order so as to permit it to reinstitute or to reform a suit which it had dismissed under the compulsion of the adjudication of contempt. But in substance Appellant's objective is nothing other than a reversal of the prior decision from which no appeal was taken and which had become final. The bankruptcy court of necessity denied the petition (Tr. 248).

In order to preclude doubt or confusion as to the scope of the issues here involved, it should be stated that no question is presented in this proceeding as to Appellant's freedom to sue the Sacramento Northern Railway. Neither is any question presented in this proceeding as to Appellant's freedom to sue the reorganized Western Pacific on any liability with respect to rate divisions alleged to have arisen subsequently to the consummation of reorganization on December 29, 1944, without violating the injunctive provisions of the Final Order.

The only issue, we repeat, is whether the Appellant is free, or should be free, to sue the reorganized company on a claim which, if it existed at all (which Appellee denies), existed on and before December 28, 1944, and was an unsecured claim that could have been but was not filed or asserted in the reorganization proceeding. That issue is related solely to (1) "the pre-reorganization period" (1928-1935) and (2) the period of judicial operation (1935-1944).

It should be clear beyond the possibility of controversy that Appellant has been debarred of any right to assert against the

reorganized The Western Pacific Railroad Company any claim arising within a period preceding the consummation of reorganization on December 29, 1944. Appellant is precluded not only by the express provisions of the Final Order but also on principles of *res judicata*. We shall ask the Court so to rule.

Preliminarily, however, it is our duty to call the Court's attention to serious doubt as to the propriety of this appeal. In our view, the order sought to be reviewed is non-appealable.

ARGUMENT

I. The Order from Which This Appeal Is Taken Is Non-Appealable.

By its petition filed on September 30, 1947 Appellant sought relief in the bankruptcy court against that court's Final Order of March 28, 1946, terminating the reorganization proceedings and closing the case. The relief sought was either by way of construction (euphemistically called "clarification") or by way of modification of the Final Order, the purpose being to avoid the bar and injunctive provisions of the Final Order. Appellant has not appealed from the Final Order itself and that order had become final long before the filing of Appellant's present petition. Confessedly it is the injunctive provisions of the Final Order that constitute a threat to Appellant in its projected suit against the reorganized company (Tr. 152). Obviously, Appellant is aggrieved, if in truth it is aggrieved at all, by the Final Order. The later order of the bankruptcy court denying Appellant's present petition in no respect enlarges or alters the force or scope of the injunction—it merely leaves the injunction unchanged.

What Appellant is in fact seeking to accomplish is a review of the Final Order, long after it became final, by a petition for a "clarification" or modification. It is not claimed, nor could it be claimed, that the bankruptcy court was without jurisdiction to make the Final Order or that the Final Order was procured by fraud. Appellant merely seeks relief from its restrictive provisions. The appeal, if Appellant had any right of appeal at all,

should have been from the Final Order. It is elementary that an order denying a petition such as Appellant's petition here is not appealable and that the Final Order cannot be reviewed on an appeal from the order denying a petition for its clarification or modification.

It has long been the settled law, as declared by this Court in *Republic Supply Co. v. Richfield Oil Co.*, 74 F.2d 909 (C.C.A. 9, 1935), that:

"The general rule is that no appeal will lie from an order denying a motion to vacate or modify a judgment, decree or order." 74 F.2d at 910.

As stated by the Circuit Court of Appeals for the Eighth Circuit in *Old Colony Trust Co. v. Kurn*, 138 F.2d 394 (C.C.A. 8, 1943, involving a railroad reorganization under Section 77:

" 'Motions to vacate orders, motions for rehearings or for new trials, and like motions are addressed to the discretion of the trial court and are intended to call its attention to errors allegedly committed by it and to afford an opportunity for their correction. Orders granting or denying such motions are not appealable.' (Citing cases) *A motion to modify a judgment falls into the same category as a motion to vacate or for a rehearing. That this court is without jurisdiction of an appeal from an order dismissing a motion to modify a judgment is too well settled to require discussion.*" 138 F.2d at 395.

See also: *Nealon v. Hill*, 149 F.2d 883 (C.C.A. 9, 1945); *McCullough v. Kammerer Corp.*, 156 F.2d 343 (C.C.A. 9, 1946); *Brown v. Thompson*, 150 F.2d 171 (C.C.A. 8, 1945).

Obviously, Appellant's present petition, filed on September 30, 1947, was much too late to keep the time open for an appeal from the Final Order of March 28, 1946, even if it be assumed that such a petition, if timely filed, would have had the effect of keeping the time open to appeal from the Final Order. Equally fatal to the present appeal is the fact that the order from which the appeal is taken is the order denying Appellant's

petition for clarification or modification (Tr. 249, 250) and not the Final Order itself.

"A refusal to modify the original order, however, *requires the appeal to be from the original order*, even though the time is counted" (when the petition was timely) "from the later order refusing to modify the original." *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 149 (1942).

The rule has been similarly stated by the Circuit Court of Appeals for the Eighth Circuit in *United States v. Muschany*, 156 F.2d 196 (C.C.A. 8, 1946):

"A *timely* motion which challenges the correctness of a judgment or order is intended to afford the trial court an opportunity to reconsider its action in entering the judgment and to amend it. The motion merely postpones the finality of the judgment and extends the time for appeal from the judgment. An appeal from the denial of such a motion is not an appeal, or the equivalent of an appeal, from the judgment or order the modification of which is sought. (Citing cases) *The appeal lies from the final judgment or order challenged by the motion, and not from the District Court's refusal to modify it.* (Citing cases)" 156 F.2d at 197.

To the same effect, see: *Bernards v. Johnson*, 314 U.S. 19 (1941); *Jones v. Thompson*, 128 F.2d 888 (C.C.A. 8, 1942); *Bass v. Baltimore & O. Terminal R. Co.*, 142 F.2d 779 (C.C.A. 7, 1944).

Here, no appeal was taken from the Final Order. The attempted appeal is from the order denying Appellant's petition for its modification. This order is not an appealable order and the appeal must therefore be dismissed.

Should the Court, however, be in doubt whether it may entertain this appeal, it will be necessary to consider the merits of the lower court's denial of Appellant's petition. We proceed therefore to a discussion of the merits.

II. Upon Principles of Res Judicata Appellant's Petition Was Properly Denied.

The essential identity of the issue sought to be raised in the suit which Appellant proposed to institute if its petition had been granted (Tr. 198) with the issue raised in the suit previously instituted by Appellant and held to be contemptuous (Tr. 120) has been shown. Elaboration will be unnecessary. Strive as it may, Appellant cannot disguise the fact that it proposes to sue the reorganized company, in the alleged right of Sacramento Northern Railway, for a retroactive adjustment of divisions of rates on traffic interchanged between the two carriers throughout a period of twenty years commencing in 1928, and that the prior suit was identical in character and directed to the same objective. Appellant seeks a money judgment against the reorganized Western Pacific, just as it sought a money judgment in its suit held to have been contemptuously brought.

Appellee resisted the Appellant's motion upon the ground that the precise issue had already been determined adversely to Appellant by Judge St. Sure's ruling in the contempt proceeding, and that the determination so made was *res judicata* of the issue (Tr. 163-68, 217-19). Clearly, this defense was determinative.

In the contempt proceeding before Judge St. Sure, arising out of Appellant's institution of suit upon the asserted claim for a retroactive adjustment of divisions of rates, the direct issue was whether the institution of that suit was violative of the Final Order in the reorganization proceeding (Tr. 115-47). On the issue thus tendered the bankruptcy court made express findings against the Appellant as follows (Tr. 149):

"(f) That in and by said action The Western Pacific Railroad Corporation has asserted and now asserts a claim against the petitioner which, if it exists at all, existed on and before December 28, 1944, and *was released and discharged by said Final Order; that the assertion of such a claim was and is barred and enjoined by said Final Order;*

and that the commencement of said action is not and has not been provided for or permitted by any order of this Court.*

(g) That in commencing and in maintaining said action against The Western Pacific Railroad Company, The Western Pacific Railroad Corporation has violated and continues to violate said Final Order of this Court in this proceeding."

Based upon these findings,† the bankruptcy court made its order holding the Appellant to be in contempt (Tr. 149). These findings not only were pertinent to the issues but they held

*Commenting upon the text of finding (f) here quoted, Appellant's brief makes the remarkable statement that "Judge St. Sure was referring only to the Appellant's claim against the Sacramento Northern Railway and was not referring to any claim that Sacramento Northern Railway * * * might have against the reorganized Western Pacific Railroad Company 'arising out of rate divisions' and 'interline settlements' * * *." (App.'s Br. 18) Appellant's statement is in error. There was no issue, and could have been no issue, before Judge St. Sure as to Appellant's claim against Sacramento Northern Railway since the Final Order did not purport to enjoin suits against that carrier. The precise issue before Judge St. Sure was whether Appellant's suit against the reorganized Western Pacific, in the asserted right of Sacramento Northern Railway, upon claims allegedly "arising out of rate divisions" and "interline settlements," was forbidden by the injunctive provisions of the Final Order. And the specific holding was that the assertion of Appellant's claim against the reorganized Western Pacific was "barred and enjoined" by the Final Order and that the commencement of the action had "not been provided for or permitted by any order of this Court." Appellant is not free to assert the contrary.

†It is hardly necessary to point out that on the issue of *res judicata* we look to the court's findings in the earlier action to determine what was there decided and what, accordingly, cannot be re-adjudicated. The prior decision is a bar, not only against a second suit on the same cause of action (here, on the issue whether the claim sought to be asserted by Appellant is within the injunctive provisions of the Final Order), but also is an estoppel against re-adjudicating in an action between the same parties those matters which were litigated and decided in the earlier proceedings (here, that the Final Order "released and discharged" Appellant's claim (Tr. 149) so that it no longer has any legal existence). See *Nev-Cal Electric Securities Co. v. Imperial Irr. Dist.*, 85 F.2d 886, 898 (C.C.A. 9, 1936); *Mason Lumber Co. v. Buchtel*, 101 U.S. 638 (1879); *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48 (1897); *Wyoming v. Colorado*, 286 U.S. 495, 507 (1931); *Sutphin v. Speik*, 15 C.2d 195, 201-03 (1940).

directly against Appellant's contentions that the bringing of the action was not violative of the Final Order (Tr. 128) and that the orders of the bankruptcy court did not affect, but actually excepted, the claim that Appellant was asserting (Tr. 140-42). This adjudication is not only *res judicata* that the assertion of a claim to a "retroactive readjustment" of divisions of rates is prohibited by the injunctive provisions of the Final Order, but is also *res judicata* that such claim, if it existed at all, existed on or before December 28, 1944, and was "released and discharged" by the Final Order. This means that it has been finally adjudicated between Appellant and Appellee that the alleged claim no longer has any existence and accordingly cannot now be asserted by Appellant.

It is plain upon the face of Appellant's petition, as well as upon the face of its brief, that Appellant is contriving to find some means by which to re-litigate the issue determined adversely to Appellant in the contempt proceeding before Judge St. Sure. On pages 3 to 5 of its brief Appellant quotes from its memorandum filed in the Court below to the following effect:

Appellant refers initially to what it terms the recitals (App.'s Br. 3), but which are in fact the findings (Tr. 149), of Judge St. Sure that the claim asserted by Appellant, if it existed at all, existed on or before December 28, 1944, that it was released and discharged by the Final Order and that the assertion thereof was barred and enjoined by the Final Order.

Next, Appellant registers its belief that Judge St. Sure's ruling was in error (App.'s Br. 3), and thereupon sets out three supposed optional procedures which were assertedly open to it for the correction of error. These supposed procedures are stated by Appellant to have been

- (a) a petition for a rehearing before Judge St. Sure;
- (b) an appeal to this Court; and
- (c) a compliance with Judge St. Sure's order, purging Appellant of contempt, followed by the institution or reinstitution of suit under the protection of an order such as Appellant now seeks (App.'s Br. 4).

Appellant elected to pursue the third of these supposed choices, but it is plain that this third optional procedure was not available to Appellant *for the correction of asserted error*. If Appellant deemed Judge St. Sure's decision to have been erroneous, it was indispensably necessary either to petition for a rehearing or to take an appeal—otherwise the decision would become final. If it were allowed to become final, it would manifestly be *res judicata* of what Judge St. Sure had decided.* Appellant permitted Judge St. Sure's ruling to become final, with the result that it became a binding adjudication that the claim asserted by Appellant had been "released and discharged" and that the institution of suit upon it had been enjoined by the Final Order.

Judge St. Sure's order of March 19, 1947 might have been open to direct review upon appeal. It was not, and is not, subject to review otherwise. No appeal was taken. The order was allowed to become final, and the Appellant dismissed its suit as to The Western Pacific Railroad Company.

The order of March 19, 1947 is therefore *res judicata* of the issue. It precludes any redetermination of the scope and effect of the Final Order and bars the Appellant's attempted assertion of a claim to a retroactive adjustment of divisions of rates between the Sacramento Northern Railway and The Western Pacific Railroad Company. Hardly need it be added that it would be fruitless to modify injunctive provisions so as to permit suit upon a claim which has been "released and discharged."

*It is well settled that orders and decisions in bankruptcy and in proceedings in reorganization are *res judicata* of the issues determined. See: *Stoll v. Gottlieb*, 305 U.S. 165 (1938) (*res judicata* effect given to an order cancelling the guarantee by a third party of bonds of the debtor); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940) (*res judicata* effect given to a readjustment order under the Municipal Debt Readjustment Act even though that Act was later, in another case, held unconstitutional by the Supreme Court); *In re National Public Service Corp.*, 88 F.2d 19 (C.C.A. 2, 1937) (applying the rule of *res judicata* in a case where the contention was that the bankruptcy court's order was too broad and went beyond the petition upon which it was made).

And it is hardly necessary to add that a decision, when it becomes final, is *res judicata* of what is decided, whether the decision be right or wrong.

Res judicata alone provides complete support for Judge Goodman's denial of Appellant's petition for a clarification or modification of the Final Order.

III. The Bankruptcy Court Correctly Determined, by Judge St. Sure's Order of March 19, 1947 in the Contempt Proceeding, That Appellant's Claim Is Barred by the Final Order of March 28, 1946 in the Reorganization Case.

While it would doubtless suffice to rest our defense of the challenged order upon principles of *res judicata* and to refrain from discussing issues which need not engage the attention of this Court, we shall nevertheless proceed to show that Judge St. Sure's determination of the issue which Appellant seeks to re-litigate was correct.

Appellant is proposing to sue a reorganized railroad company—a company which has been reorganized under a special statute whose remedial purposes have been judicially recognized—and which has been released and discharged from all of its pre-existing liabilities and obligations, as well as liabilities and obligations of the reorganization trustees, *except as certain of such liabilities and obligations have been expressly preserved*.*

The essential objective of a railroad reorganization under Section 77 of the Bankruptcy Act is to obtain a reorganization which is compatible with the public interest. This consideration is emphasized in the decision of the Supreme Court which ap-

*While the reorganized The Western Pacific Railroad Company is nominally identical with the debtor company which filed the application for reorganization, the old corporate charter having been retained as authorized by the reorganization plan (Tr. 231), in substance the reorganized company is distinct from the debtor company. All of the stock of the debtor company (held by Appellant) was found to be worthless and was required to be cancelled (Tr. 232-33) and the reorganized company has issued new stock, together with new bonds, to the secured creditors in conformity with the plan. There has been a complete change in capitalization and ownership. The Appellant's unsecured claims were found to be "without value" (Tr. 231-32). The reorganized company has been released and discharged from antecedent liabilities and obligations and has been given immunity against suit in the same measure and to the same effect as if a new corporation had been organized to consummate the reorganization.

proved the Western Pacific reorganization plan. *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, 475 (1943). It is of course indispensable to the effectuation of that objective that all claims for which provision is not made by the plan and by orders of the bankruptcy court shall be cancelled and discharged. That is the necessary effect of every railroad reorganization under Section 77.

The "remedial purposes" of the legislation embodied in both Section 77 of Section 77B, in relation particularly to the release and discharge of interests and claims of every character, have been repeatedly emphasized in court opinions. *City Bank Farmers Trust Co. v. Irving Trust Co.*, 299 U.S. 433, 438-40, 442, 444 (1937); *Brown v. Gerdes*, 321 U.S. 178, 181 (1944); *In re Sterba*, 74 F.2d 413, 417 (C.C.A. 7, 1935); *In re Greyling Realty Corp.*, 74 F.2d 734, 736 (C.C.A. 2, 1935); *Campbell v. Alleghany Corp.*, 75 F.2d 947, 949 (C.C.A. 4, 1935). See also: 5 *Collier on Bankruptcy* (14th Ed.) Sec. 77.02, pp. 468, 469; 6 *Id.* Sec. 11.18, pp. 3921-24.

In the very recent case of *Duryee, Trustee v. Erie Railroad Company* (C.C.A. 6, decided June 1, 1949, not yet officially reported) the underlying purposes of Section 77 were stated by the court as follows:

"We are in complete agreement with the observations made by the district court in its opinion dismissing appellant's action to the effect that the purpose of the bankruptcy law and the provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute; that if courts should relax the provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated; that creditors would not participate in reorganizations if they could not feel that the plan was final; and that it would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constituted the basis of its earlier acceptance.

“With respect to appellant’s contention that to allow the reorganization order to bar the claim now asserted would be inequitable, fraudulent, and in contravention of public policy, we find nothing to justify such a conclusion. What has already been said with respect to the nonfiling of the claim sufficiently disposes of the contention that the barring of the present suit would be inequitable and against public policy.”

The provisions of Section 77 respecting the discharge of debts and liabilities by the final decree in a reorganization proceeding do not differ in substance from the correlative provisions in Section 77B (now embodied in Chapter X) relating to other corporate reorganizations. The author of *Collier on Bankruptcy*, in the text last above cited, summarizes the purpose and effect of the discharge provision (Sec. 228(1)) in the following terms:

“Hence, unless specific provision is made otherwise, the final decree—which concludes the proceeding and closes the estate—discharges and terminates every right against and interest in the debtor of every kind, including liabilities incurred during reorganization, and including even the holders of claims or interests not filed or scheduled in the proceeding or who had no notice of it.”

The true character of the claim which Appellant proposes to assert in its proposed suit should be clearly understood. Appellant’s claim is for a money judgment against Appellee, the reorganized railroad company. This cannot be denied; the whole purpose of this appeal is to open the way for a modification of the Final Decree so as to permit Appellant to sue Appellee and obtain a money judgment against it. Appellant cannot represent, and does not represent, that the alleged indebtedness was at any time incurred or assumed either by the debtor company or its Reorganization Trustees. On the contrary, the indebtedness was incurred by Sacramento Northern Railway in 1928, or more than twenty years in the past. Appellant proposes to sue the reorganized railroad company, in a so-called derivative action in the alleged right of Sacramento Northern Railway, to obtain against

Appellee a judgment which will satisfy Appellant's claim against the Sacramento Northern Railway. The theory of the suggested derivative action is that the agreed divisions of rates between the Sacramento Northern Railway and The Western Pacific Railroad Company were unjust and inequitable to the former, and that there should be a "retroactive readjustment" of such divisions, followed by recovery of a judgment against Appellee for the amount shown to be due thereunder, in the right of Sacramento Northern Railway but for the benefit of Appellant.*

Thus the claim which Appellant proposes to assert attacks twenty years of *closed interline accounts*. The claim covers the prereorganization period of approximately seven years (1928-1935) and the period of judicial operation of more than nine years (1935-1944). This statement, without more, should suffice to reveal the fantastic character of Appellant's program.

Undoubtedly this Court understands that the Appellant itself, as the controlling parent corporation of both Sacramento Northern Railway and The Western Pacific Railroad Company, was wholly responsible for the divisions of rates of which it now seeks to complain. Moreover, in every year from 1928 to 1944

*It is not a matter of any consequence, notwithstanding Appellant's suggestion to the contrary (App.'s Br. 25, 26), that Sacramento Northern Railway was not a party to the reorganization proceeding. The cases cited on page 27 of Appellant's brief, viz: *Thompson v. Terminal Shares, Inc.*, 104 F.2d 1 (C.C.A. 8, 1939) and *Callaway v. Benton*, 336 U.S. 132 (1949), are not remotely in point.

The facts are that the stock and bonds of Sacramento Northern Railway were pledged under a bond mortgage of the prereorganized Western Pacific, as Appellant well knew. As Appellant also knows, the stock and bonds of Sacramento Northern Railway are now pledged under the new bond mortgages of the reorganized company. Yet Appellant feels entirely free to argue in this Court that its unsecured claim against the Sacramento Northern Railway should take precedence not only over the latter's bond mortgage and the bond mortgage of the prereorganized Western Pacific but also over the new bond mortgages of the reorganized Western Pacific. This would not only disregard and reverse the normal order of "absolute priority" but would completely evade the objectives and consequences of reorganization. Appellant's unique and quite unorthodox concept of "equity" and "good conscience," to which it persistently appeals, stands forth in bold relief both here and elsewhere in its brief.

the Appellant knew the facts. Appellant knew that throughout the entire term of the reorganization proceeding, extending from August 2, 1935, until the entry of the Final Decree on March 28, 1946, the bankruptcy court was open to receive and hear all claims. Appellant was a party to the reorganization proceeding, but *the claim which Appellant proposes to assert in its contemplated suit against the reorganized railroad company, arising out of transactions of the debtor company from 1928 to 1935 and transactions of the reorganization trustees from 1935 to 1944, was never filed or presented in the reorganization proceeding.*

Reorganization proceedings would be a trap for the unwary and a haven for insiders if claims of this character, predating the inception of the proceedings, could be withheld until the claims of other interests have been scaled down or barred by reorganization, and thereafter impressed upon the assets in the hands of the reorganized company, thereby taking precedence over the secured creditors held entitled to participate in the reorganized enterprise. It would be a travesty if such consequences could follow the consummation of reorganization.

Appellant has been forced to concede upon brief (App.'s Br. 12-14) that the claim which it desires to assert in its proposed suit is within the prohibitions of the discharge and injunctive provisions of the Final Order, unless the assertion of that claim is "specifically provided for or permitted by prior order of this court," i.e., of the bankruptcy court. Appellant represents that its proposed suit is within the "exceptive clauses" of the Final Order. It purports to find authority for the institution of its cause of action in the initial order of the bankruptcy court, entered on August 2, 1935 (Tr. 2), by which "the debtor is authorized, in its discretion," *inter alia*, to settle and pay "claims arising out of rate divisions" and "interline settlements" (Tr. 4-5). (It should be noted that the debtor was "authorized," *not directed*, to make such payments "in its discretion.") The authority so given to the debtor was reaffirmed in the court's

subsequent order of September 23, 1935, appointing the Reorganization Trustees (Tr. 16, 21).

Appellant would seek to persuade this Court that its proposed suit is for an "interline settlement" and that such suit is within the "exceptive clauses" of the final order. Appellant advanced precisely the same contentions in the contempt proceeding before Judge St. Sure. (See answer and return of The Western Pacific Railroad Corporation to order to show cause, filed September 23, 1946 (Tr. 137, 140-1).) But Judge St. Sure was not misled by Appellant's contention. He expressly found that Appellant's claim had been "*released and discharged*" by the Final Order and that the institution of the suit "*has not been provided for or permitted by any order of this Court*" (Tr. 149).

It should be exceedingly plain, without the aid of Judge St. Sure's findings and conclusions, that the suit which Appellant proposes to institute is not for an "interline settlement." The term "interline settlement" is a conventional term, having in railroad and accounting practice a well recognized meaning. An "interline settlement" is the payment by one carrier to another of the net balance shown to be due under the "interline accounts" rendered by each carrier to the other for the same period. Such interline accounts are commonly rendered monthly, followed by interline settlements which are also made monthly. These are not "running accounts." The accounts are rendered and the settlements are made in accordance with "rate divisions" which are set forth in division sheets. Rate divisions are customarily agreed upon by the participating carriers and, in the absence of agreement, may be fixed by the Interstate Commerce Commission. The phrase "claims arising out of rate divisions" is simply an alternative for the interline accounting which precedes the making of "interline settlements." Accordingly, permission to pay "claims arising out of rate divisions" is the equivalent of permission to make or pay "interline settlements," which of necessity are based upon rate divisions.

It is clearly revealed, both in Appellant's petition (Tr. 154-55) and in its brief upon this appeal, that its proposed suit is not in fact upon "interline settlements." It is stated repeatedly throughout Appellant's brief that it is seeking what it terms "a retroactive adjustment of revenue divisions" or "a retroactive readjustment of divisions" (App.'s Br. 10, 21, 22, 23). This would not be an "interline settlement." These two terms are incompatible. In our view it is sheer casuistry to suggest that a suit contemplating "a retroactive readjustment of divisions," to be accomplished avowedly "as the result of an intricate accounting" (Tr. 208), is the equivalent of a suit for an "interline settlement."*

*Quite belatedly, Appellant has been brought to realize that it could not in any event secure its desired "retroactive readjustment" of divisions without application to the Interstate Commerce Commission for administrative relief (App.'s Br. 10-11). Appellant states that this "involves a factual inquiry and a readjustment of divisions committed to the Interstate Commerce Commission by the Interstate Commerce Act" (App.'s Br. 10). (Parenthetically, Appellant here starkly reveals that its proposed suit is in no sense for an "interline settlement." Its objective is of an entirely different character.) But Appellant overlooks the circumstance that the authority given to the Commission to adjust divisions *retroactively* under the applicable provision of the statute (Section 15(6), reproduced on pages 9-10 of Appellant's brief) is restricted to "the period subsequent to the filing of the complaint or petition or the making of the order of investigation." Thus the Commission could not prescribe divisions retroactively for any part of the period with which we are here concerned.

Appellant has also failed to note that Section 15(6) differs in this respect from Section 15(13) of the Act involved in *El Dorado Oil Works v. United States*, 328 U.S. 12 (1946), upon which the Appellant purports to rely (App.'s Br. 11).

No court has authority to prescribe divisions of rates, either prospectively or retrospectively. This is for the reason that the division of joint rates, like the making of rates, "is a legislative and not a judicial function." *Terminal R.R. Assn. v. United States*, 266 U.S. 17, 30 (1924); *Brimstone R.R. Co. v. United States*, 276 U.S. 104 (1928). In the case last cited the Supreme Court stated that "the studied purpose" of Section 15(6) was "to grant no power to require readjustments of past receipts from agreed joint rates." See also *United States v. Baltimore & O. R. Co.*, 284 U.S. 195 (1931).

It is only too clear that if the Final Order were to be modified upon Appellant's petition so as to permit the institution of its proposed suit the reorganized company would be involved in protracted and costly proceedings before the Interstate Commerce Commission, followed by a proceed-

Even if the Appellant had been able to persuade Judge St. Sure, or if it could now persuade this Court, that its proposed suit is for an "interline settlement," it could not establish its contention that such a suit is within the "exceptive clauses" of the Final Order. It is incumbent upon Appellant to show that a "*suit*" has been "specifically provided for or authorized by prior order of this Court." No such authorization can be found. It is not to be found, as Appellant would find it, in Order No. 1, entered on August 2, 1935, which, as we have noted, goes no further than to "authorize" the debtor (and subsequently the Reorganization Trustees) "in its discretion" to make interline settlements. This authorization cannot be expanded in such fashion as to permit the institution of "*suit*" by or in behalf of any claimant respecting such "interline settlements."

This Court will understand that the authorization to pay interline settlements, in common with the authorization to pay operating expenses, reflects the common practice in reorganization proceedings to permit the payment of necessary expenses incurred within a reasonable period, usually not exceeding six months, prior to the institution of the proceeding. The expenses must have been incurred in order to keep the railroad a going concern. The objective is to insure that the maintenance of a necessary service will not be suspended by reason of impairment of the financial credit of the operating company.*

ing in court to the end that the Appellant might obtain its "judicial settlement." This would be completely in derogation of one of the prime objectives of railroad reorganization proceedings.

The Court will not overlook the Appellant's declaration of its bizarre proposal to have the rate divisions so recast as to make the reorganized company accountable "for all of the revenue derived from the full line haul except the out-of-pocket operating cost applicable thereto" (Proposed Complaint, Par. IX; Tr. 208). And yet Appellant would seek to persuade this Court that its proposed suit is for an "interline settlement" within the meaning of that term included in the bankruptcy court's initial order of August 2, 1935.

*The authorities listed in the footnote on page 20 of Appellant's Brief confirm what has been said herein respecting the circumstances under

It should be clearly understood that an order of a bankruptcy court authorizing a receiver or trustee to pay necessary operating expenses, including the making of interline settlements, "in his discretion," does not vest the claimant with any right or priority over mortgage liens. It gives to the claimant no right of action. The order is permissive merely. If a receiver or trustee fails to pay a particular claim, "the parties in interest may rightfully challenge its priority even if it were within the very letter of the order of appointment of the receiver." These are the words of the Supreme Court in *Louisville, E. and St. L. R. Co. v. Wilson*, 138 U.S. 501, 506 (1891). See also: *Gregg v. Metropolitan Trust Co.*, 197 U.S. 183 (1905); *Atchison, T. & S. F. Ry. Co. v. Osborn*, 148 Fed. 606, 610 (C.C.A. 8, 1906); *Fordyce v. Omaha, Kansas City & E. R.R.*, 145 Fed. 544, 555 (C.C., W.D. Mo. 1906); *Monsarrat v. Mercantile Trust Co.*, 109 Fed. 230, 231 (C.C.A. 6, 1901); *Bankers' Trust Co. v. Florida East Coast Ry. Co.*, 9 F. Supp. 258, 261 (S.D. Fla. 1934).

Thus, even if Appellant's extraordinary claim had been presented to the Trustees (as it was not) and the Trustees had declined to pay it, Appellant's case would not thereby be fortified. Orders of this character authorizing the payment of claims create no rights, preferred or otherwise, in the claimants, and are permissive only.

The claim which Appellant seeks to maintain in its proposed suit is not within either the terms or purposes of the initial order of the bankruptcy court authorizing the payment of "interline

which claims for necessary operating expenses may be paid, as well as the reasons underlying the established practice. Thus the quotation from 3 Jones on Bonds and Bond Securities refers to "balances due other railroads and lines of transportation on account of passenger tickets and freight charges." The text-writer also refers to "the payment of limited amounts due connecting roads for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations where an interruption of such relations could be a probable result in case of non-payment." Appellant cannot bring its claim within these specifications. It is not proposing to institute suit for "balances due" or "for unpaid ticket and freight balances."

The three decisions cited in the footnote set forth the rule substantially as we have stated it.

settlements." It is nothing other than factual distortion to represent that Appellant is proposing to sue upon "interline settlements."

We have noted that the claim which Appellant proposes to assert in its contemplated suit is referable in part to the pre-reorganization period (1928-1935) and in part to the period of judicial operation (1935-1944). This claim was at no time presented to the bankruptcy court in the reorganization proceeding. Failure to assert the claim while the proceeding was pending is fatal to its assertion after the entry of the Final Order terminating the proceeding and closing the case.

Claims which might have been but were not presented during the reorganization proceeding may not be later asserted. *McColgan v. Maier Brewing Co.*, 134 F.2d 385 (C.C.A. 9, 1943), cert. den. 320 U.S. 737; *Standard Steel Works v. American Pipe & Steel Corp.*, 111 F.2d 1000 (C.C.A. 9, 1940); *American Service Co. v. Henderson*, 120 F.2d 525 (C.C.A. 4, 1941); *In re Corona Radio & Television Corp.*, 102 F.2d 959 (C.C.A. 7, 1939).

It is beyond question that liabilities alleged to have been incurred by the debtor prior to the inception of the reorganization proceeding are released and discharged by the Final Order except as certain claims, or classes of claims, are expressly reserved in the Final Order. It is also well established that liabilities alleged to have been incurred by a receiver or trustee in the course of administering the trust estate do not survive the receivership or trusteeship and do not become liabilities of the trust properties after their revestment in the reorganized company "unless the court has so directed." This Court has authoritatively so determined in *McColgan v. Maier Brewing Co.*, 134 F.(2d) 385 (C.C.A. 9, 1943), cert. den. 320 U.S. 737.

That case involved California franchise taxes which allegedly accrued during a bankruptcy receivership. The Franchise Tax Commissioner presented no claim and, after a plan of composition was effected and confirmed by the court, the corpora-

tion's properties were turned back to it and the proceedings were terminated. The corporation then conducted its own affairs until a year or so later when creditors petitioned for a reorganization under Chapter X. In the reorganization proceedings the Franchise Tax Commissioner filed a claim for the franchise taxes that accrued during the bankruptcy receivership. In upholding the order rejecting this claim, because it was not presented in the bankruptcy receivership or otherwise provided for, this Court held that though the obligation for the taxes was not a provable debt owing by the corporation but a receivership obligation (134 F.2d at 387), it was nevertheless barred, saying:

"Upon confirmation of the plan for composing the debts of the Maier Brewing Company, the receiver was discharged and the property unconditionally turned back to the corporation. Does the property so returned remain liable for debts incurred by the receiver in the course of administration? We understand not, unless the court has so directed. The general rule is thus stated in Clark on Receivers (2nd edition 1929), page 108 volume 1: 'The effect of the discharge of a receiver and surrender of jurisdiction over the trust, without any reservation as to existing claims, is to release not only the receiver, but also, the property from further liability.'"

The Court said further:

"Of course if these taxes had been assessed and a claim made upon the receivers for their payment they would, like administrative expenses generally, have occupied a preferred status. But the statute does not dispense with the necessity for making timely demand for their payment in the receivership proceeding. As much now as in the past orderly procedure requires that administrative expenses be settled while the property yet remains in the custody of the court." 134 F.2d at 387, 388.

The objective to be attained by a statutory reorganization, with respect particularly to the discharge of claims and demands, has been expressed by the Supreme Court in *City Bank Farmers*

Trust Co. v. Irving Trust Co., 299 U.S. 433 (1937), in the following terms:

"The purpose of Section 77B was to facilitate rehabilitation of embarrassed corporations by a scaling or rearrangement of their obligations and shareholders' interests, thus avoiding a winding up, a sale of assets, and a distribution of the proceeds. A salient element in such a reorganization is *the discharge of all demands of whatsoever sort, executory and contingent, presently due or to mature in the future.*" 299 U.S. at 438-39.

These principles are equally applicable, and the remarks equally pertinent, to a railroad reorganization under Section 77.*

*On page 22 of its brief Appellant cites five decisions in ostensible support of its assertion that those who receive assets from receivers and trustees are customarily required to enter into agreements whereby claims arising out of the acts of the receivers or trustees are protected despite their discharge. None of these decisions is relevant or pertinent. In no instance was a statutory reorganization involved.

The decisions of the Supreme Court in *Texas and Pacific Ry. Co. v. Johnson*, 151 U.S. 81 (1894) and *Texas and Pacific Ry. Co. v. Bloom*, 164 U.S. 636 (1897), arose out of a single railroad receivership and resulted in similar holdings. It appeared in the *Johnson* case that a receiver had been appointed "in an amicable suit at the instigation of the company and for the company's own purposes * * *." 151 U.S. at 99. After the company's purposes had been accomplished, the property was returned to its owner *without reorganization pursuant to a foreclosure sale or otherwise*. It was the conclusion of the court below that the plaintiff's claim, which arose during the receivership, could be maintained against the railroad company since, under the circumstances there disclosed, "the acts of the receiver might well be regarded as the acts of its own servant, rather than those of an officer of the court, which under such circumstances he would only be *sub modo*." *Ibid*. In its opinion affirming the judgment of the lower court the Supreme Court pointed out *inter alia* that "the property was not sold but merely redelivered to the company." Moreover, "No judgment *in rem* was entered * * *." *Id.* at 102.

The decisions in *Bartlett v. Cicero Light, Heat & Power Co.*, 52 N.E. 339 (Ill. 1898); *Anderson v. Chicago R. I. & P. Ry. Co.*, 175 N.W. 583 (Iowa 1920); and *Stuart v. Dickinson*, 235 S.W. 446 (Mo. 1921), which are also cited in Appellant's brief, arose under circumstances substantially similar to those presented in the two cases just reviewed. In each of these three cases, upon the discharge of the receiver the property of the defendant corporation was returned to its owner, without reservation and likewise without reorganization. The rulings followed the rulings of the Supreme Court in the *Johnson* and *Bloom* cases.

The case of *Hanlon v. Smith*, 175 Fed. 192 (N.D. Iowa 1909) arose

The statute explicitly declares that, upon confirmation of the reorganization plan by the judge, the provisions of the plan shall be "binding upon * * * all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." Section 77(f) of Federal Bankruptcy Act, 11 U.S.C. Sec. 205(f).

The plan of reorganization, formulated by the Interstate Commerce Commission and confirmed by the bankruptcy court, expressly finds that the unsecured claims of The Western Pacific Railroad Corporation are "without value" (Tr. 51-52). *Western Pac. R. Co. Reorganization*, 233 I.C.C. 409, 452 (1939).

Appellant relies upon the assumption agreement, for which provision is made in the revestment order, which Appellant terms the "nexus" of Appellant's asserted right to sue the reorganized company for the account of the Sacramento Northern Railway (App.'s Br. 21). Appellant's reliance is misplaced. The agreement is in conventional form and is plainly designed, first, to free the trustees from further liability or responsibility of any character and, second, to impose upon the reorganized company such liabilities and obligations as have been expressly preserved by orders of court. But the agreement cannot be construed, as Appellant would construe it, to preserve all manner of claims arising out of acts of the trustees, despite their discharge from personal liability (App.'s Br. 22).

Appellant's error is readily demonstrable. The assumption

out of an equity receivership terminating in a sale under order of court. In view of an unrestricted requirement in the decree of sale and the order of confirmation that the purchaser "should assume and pay all the liabilities incurred by the receivers at any time before their final discharge * * *" (175 Fed. at 193), it was ruled that suit could be maintained upon a claim arising during the receivership.

Appellant has failed to produce a single decision arising out of any corporate reorganization under Section 77 or Section 77B, or even under a foreclosure sale in an equity receivership, holding that liabilities incurred by trustees or receivers survive the reorganization except as provision is made for such survival by specific court order.

agreement is not to be construed in dissociation from the order of court requiring it to be made, nor in disregard of the provisions of the plan of reorganization with which it is required to be "consistent." The agreement cannot give life to claims which were lacking the prerequisite of court allowance, nor can it be the source of new liabilities or obligations. It cannot mean more than that the reorganized company is to assume only the valid and outstanding obligations and liabilities of the debtor company and the debtor company's trustees, and only those which are preserved under the plan of reorganization. That such is the true effect of the agreement of assumption is shown by paragraph 9 of the revesting order, requiring the agreement to be made, reading in part that—

"said Railroad Company shall assume only the valid and outstanding obligations and liabilities of the debtor or the debtor's Trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged, and only such obligations and liabilities as are preserved under the plan of reorganization and are not limited or discharged by the prior orders of this Court." (Tr. 74, 87)

The quoted language is authoritative and conclusive. It forbids a construction which would require the reorganized company to assume *all* liabilities and obligations which may have been incurred by or may be asserted against the reorganization trustees. It permits the assumption only of "valid and outstanding obligations and liabilities of the debtor or the debtor's Trustees."

Certain it is that Appellant's claim, which has never been brought to the attention of the bankruptcy court or otherwise asserted, cannot fall within this characterization. The claim in its nature is an extraordinary one. It is an established principle that reorganization trustees have no authority to charge the estate with liability without the sanction of an order of the court.*

*The same principle governs receivers. *Chicago Deposit Vault Co. v. McNulta*, 153 U.S. 554 (1894).

In recognition of this principle, the bankruptcy court, in Order No. 1, expressly withheld authority to incur any extraordinary expense without the prior approval of the court. This order authorized the debtor to manage and conduct its business as a railroad company in the customary manner but this authority was expressly qualified by restrictive provisions reading in part as follows (Tr. 4):

"The authority given by the foregoing shall not include authority to incur expense, other than such as is necessary in the course of the usual and ordinary maintenance ^{and operation} of the debtor's property. Any extraordinary expense and expense incident to reorganization of the debtor *shall be subject to the prior approval of the Court.*"

These provisions were reaffirmed in the subsequent orders of the court appointing and confirming the trustees (Tr. 16, 21).

It should be plain that a liability of the remarkable character now lately asserted by Appellant could not have been incurred "in the course of the usual and ordinary maintenance and operation of the debtor's property." On the contrary, such liability would have been an "extraordinary expense," and since it was at no time brought to the attention of or approved by the bankruptcy court, it could not have become an obligation of the reorganization trustees. It follows inevitably that it could not have been assumed by the reorganized company.

The Court's final order of March 28, 1946 declares, *inter alia*, that:

"The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order." (Tr. 108, 109)

(The "said order" referred to in the closing words of the foregoing is the revesting order of November 27, 1944, which con-

tains no provision preserving claims of the character here attempted to be asserted by Appellant.)

The injunctive provisions of the Final Order are commensurate with the "release and discharge." By paragraph 6 of the Final Order "All persons * * * are hereby perpetually restrained and enjoined from instituting * * * any suit * * * against The Western Pacific Railroad Company, * * * directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), * * * and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this court), * * *." (Tr. 111-13)

We again note that no sanction can be found in any prior order of the Bankruptcy Court for the institution of suit upon the Appellant's claim.

In summary, the assertion of Appellant's claim against the reorganized The Western Pacific Railroad Company is barred by the provisions of the statute, by the terms of the reorganization plan, which has long since been consummated, and by the provisions of the court's Final Order in the reorganization proceeding. It was correctly determined, by the order in the contempt proceeding before Judge St. Sure, that this claim has been "released and discharged" and that the institution of suit upon it "has not been provided for or permitted by any order of this Court."*

*The case of *Booth v. Hoskins*, 75 Cal. 271 (1888), cited by Appellant, is completely irrelevant (App.'s Br. 7, 28, 29). That case holds merely that a landowner, who would quiet his title against a mortgage that has

IV. Appellant Has No Standing to Assert Claims of Sacramento Northern Railway Against Appellee.

A claimant who has not reduced his claim to judgment is not entitled to maintain a creditor's bill or to seek any equitable relief in connection with claims which the alleged debtor may have against third persons. *Swan Land & Cattle Co. v. Frank*, 148 U.S. 603 (1893); *Hoehn v. Crews*, 144 F.2d 665 (C.C.A. 10, 1944), cert. den. 323 U.S. 773; *Nielsen v. Gillespie*, 97 Cal. App. 319, 275 Pac. 500 (1929); *Delaney P. & R. Co. v. Crystal Petroleum Products Co.*, 88 Cal. App. 784, 264 Pac. 521 (1928). Appellant has not prosecuted its claim to judgment against the Sacramento Northern Railway. Unless and until it has done so, and the judgment shall have been returned unsatisfied, it has no standing to bring suit against The Western Pacific Railroad Company, the Appellee herein, upon any alleged indebtedness of the latter to the Sacramento Northern Railway.

V. The Bankruptcy Court Was Without Jurisdiction to Modify the Final Order Upon the Petition of the Appellant.

By a petition filed in the reorganization proceeding on March 18, 1946, the Reorganization Committee requested a Final Order terminating the proceeding. The bankruptcy court on that day directed that a hearing be held on the petition on March 28, 1946 and that notice of the hearing be sent to all parties to the reorganization, including Appellant. Notice was sent as directed. The bankruptcy court on March 28, 1946, after hearing, signed and filed the Final Order discharging the debtor from all of its liabilities (except as otherwise expressly provided) and closing the proceeding (Tr. 108-15). The objections to the Final Order which Appellant now asserts could have been but were

been outlawed, may be required to pay what is due as a condition to obtaining affirmative equitable relief. It is impossible to assimilate that case to the instant case, in which a reorganized company is resisting the assertion of a discharged and barred claim. The prime purpose of the discharge and bar order is to afford exactly this protection and there is nothing whatever inequitable in the reorganized company's relying upon it.

not asserted by Appellant at the hearing upon the petition of the Reorganization Committee, nor did Appellant appeal from the Final Order. Under these circumstances, the bankruptcy court has no jurisdiction to modify the Final Order as sought by Appellant. *Duebler v. Sherneth Corp.*, 160 F.2d 472 (C.C.A. 2, 1947); *Reese v. Beacon Hotel Corp.*, 149 F.2d 610 (C.C.A. 2, 1945); *In re Sherland Bldg. Corp.*, 29 F. Supp. 985 (N.D. Ind. 1939).

The bankruptcy court has no jurisdiction, without first reopening the case, to modify its Final Order in a bankruptcy proceeding in the absence of an appropriate reservation of jurisdiction.* *In re Argyle-Lake Shore Corp.*, 98 F.2d 372 (C.C.A. 7, 1938); *In re Peyton Realty Co.*, 148 F.2d 771 (C.C.A. 3, 1945); *In re Wedgewood Hotel Co.*, 125 F.2d 327 (C.C.A. 7, 1942); *In re Corona Radio & Television Corp.*, 102 F.2d 959 (C.C.A. 7, 1939).

In the present case, the bankruptcy court reserved no jurisdiction to modify its Final Order and Appellant's petition is in no sense a petition to reopen the case.

More than this, the Final Order in a bankruptcy proceeding is an adjudication *in rem*† and binds everybody,"including even the holders of claims or interests not filed or scheduled in the proceeding or who had no notice of it." 6 *Collier on Bankruptcy* (14th Ed.) Sec. ^{11.18}~~77.02~~, pp. ^{392, 393}~~468, 469~~.

A court sitting in a bankruptcy proceeding will not in any event reopen a case where, as here, it has no power to grant the ultimate relief sought. *Duebler v. Sherneth Corporation*, 160

*It has been held that "reservation of jurisdiction beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court." *Reese v. Beacon Hotel Corp.*, 149 F.2d 610, 611 (C.C.A. 2, 1945) (citing cases).

†In the leading case of *Local Loan Co. v. Hunt*, 292 U.S. 234, 241 (1934), the Supreme Court said:

"And, generally, proceedings in bankruptcy are in the nature of proceedings *in rem*, adjudications of bankruptcy and orders of discharge being, as this court clearly has treated them, in every essential particular decrees in equity determining a 'status.' "

F.2d 472 (C.C.A. 2, 1947); *Milando v. Perrone*, 157 F.2d 1002 (C.C.A. 2, 1946); *Phillips v. Tarrier Co. of Delaware*, 93 F.2d 674 (C.C.A. 5, 1938).

VI. The Bankruptcy Court, Even if It Had Jurisdiction to Modify the Final Order, Should Not Exercise That Jurisdiction Under the Circumstances Here Presented.

There is no equity in Appellant's petition for modification of the Final Order so as to permit the institution of its proposed suit. If this Court should conclude that the bankruptcy court had jurisdiction, in its discretion, to modify the Final Order at the request of Appellant, the bankruptcy court should properly refuse to exercise that authority for the following reasons:

(a) The divisions of rates between Sacramento Northern Railway and The Western Pacific Railroad Company were established at a time when the Appellant, as parent of the railroad group of which the Sacramento Northern Railway and The Western Pacific Railroad Company were members, had full control over such divisions of rates.

(b) Appellant for many years prior to the reorganization and at all times during the reorganization was familiar with such divisions of rates and did not complain of them. Presumptively Appellant was satisfied that the divisions were entirely just to the Sacramento Northern Railway, as Appellee believes them to have been.

(c) Appellant was not only a party to the reorganization proceeding but, prior to the confirmation and consummation of the reorganization plan, was the sole stockholder of the debtor company and one of its largest unsecured creditors. Although Appellant presented its claims as a stockholder and unsecured creditor, it failed to present the claim which it now seeks to assert.

(d) Appellant represents that the claim which it now seeks to assert, and which it failed to present or assert during the reorganization proceeding, is entitled to priority over the preexist-

ing bond mortgages of the debtor, and should rank with the reorganized company's current liabilities. Thus, Appellant seeks to gain priority, for an unsecured claim which it failed to present or assert during the reorganization proceeding, over the secured claims of creditors found to be entitled to priority under the plan of reorganization heretofore consummated.

(e) Since the entry of the Final Order, the reorganized company has conducted its business, and investors have purchased and held securities of the reorganized company, in reliance upon the Final Order, and such reliance makes modification of the order inequitable.

Under circumstances such as these, the reorganization court will not entertain a request for modification of a final order in a reorganization proceeding. *Mohonk Realty Corp. v. Wise Shoe Stores, Inc.*, 111 F.2d 287 (C.C.A. 2, 1940), cert. den. 311 U.S. 654; *Knapp v. Detroit Leland Hotel Co.*, 153 F.2d 715 (C.C.A. 6, 1946); *In re Tom Moore Distillery Co.*, 52 F. Supp. 938 (W.D. Ky. 1943); *In re McCrory Stores Corp.*, 19 F. Supp. 367 (S.D. N.Y. 1937); *In re Peyton Realty Co.*, 148 F.2d 771 (C.C.A. 3, 1945); *In re Universal Lubricating Systems, Inc.*, 71 F. Supp. 775 (W.D. Pa. 1947).

If it were to be assumed that the bankruptcy court had authority, in its discretion, to modify the Final Order as sought by Appellant's petition, certainly it could not be concluded that the bankruptcy court abused its discretion in denying Appellant's petition.

CONCLUSION

Preliminarily we noted that the order which Appellant seeks to have reviewed upon appeal is non-appealable. We believe that objection to be fatal to the maintenance of this appeal.

Should the Court be in doubt as to the appealability of the challenged order, we think demonstration has been afforded that

- (1) the ruling of the bankruptcy court, by order entered on March 19, 1947 in the contempt proceeding, is *res judicata* of the issue which Appellant seeks to relitigate;
- (2) it was correctly determined by Judge St. Sure's order of March 19, 1947 in the contempt proceeding that Appellant's claim is barred by the Final Order of March 28, 1946 in the reorganization case;
- (3) Appellant has no standing to assert claims of Sacramento Northern Railway against Appellees since a claimant who has not reduced his claim to judgment is not entitled to maintain a creditor's bill or to seek any equitable relief in connection with claims which the alleged debtor may have against third persons;
- (4) the bankruptcy court was without jurisdiction to modify the Final Order upon Appellant's petition since (a) such jurisdiction was not reserved, (b) a reservation of jurisdiction beyond what is requisite to effectuate a plan of reorganization, is without the power of the reorganization court, and (c) a bankruptcy court will in no event reopen a case where it has no power to grant the ultimate relief sought;
- (5) there is no equity in Appellant's petition designed to secure authority to institute or reinstitute a suit whereby Appellant's unsecured and barred claim would be accorded priority over secured claims the holders of which have accepted bonds and stock in the reorganized company.

The order of the District Court denying Appellant's petition for clarification or modification of the Final Order in the bankruptcy proceeding should be affirmed.

Respectfully submitted,

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Dated: San Francisco, California,
June 16, 1949

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No. 12160

United States
Court of Appeals
for the Ninth Circuit

RALPH D. GOMEZ and WILLIAM HENDER-
SON, as individuals and co-partners doing busi-
ness under the name of Gomez Manufacturing
Company,

Appellants,

vs.

GRANAT BROS., a corporation, and JOSEPH
GRANAT,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

MAR 5 - 1949

PAUL P. O'BRIEN, 
CLERK

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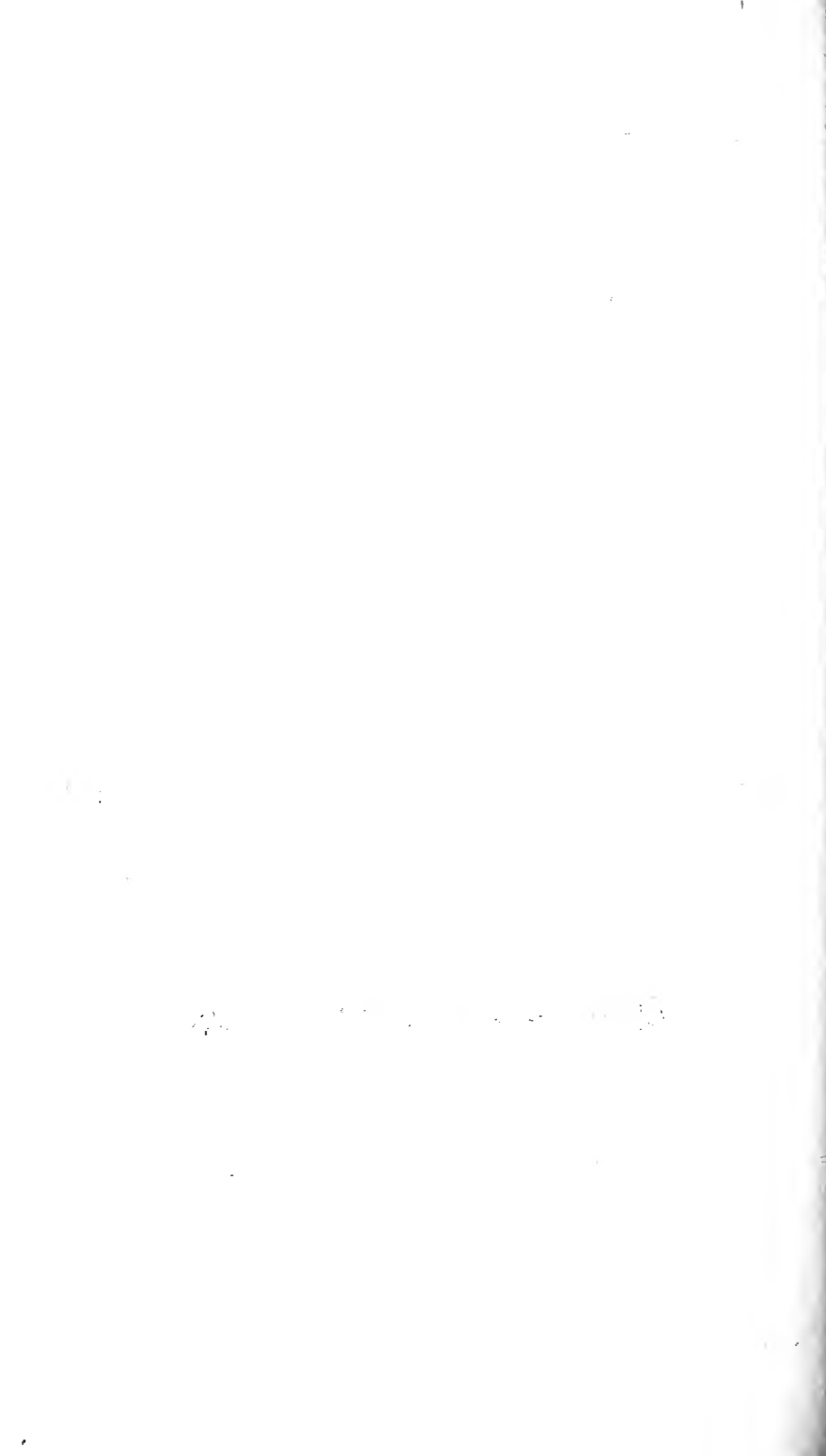
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In the United States District Court for the Northern
District of California, Southern Division

No. 28018-G

RALPH D. GOMEZ,

Plaintiff,

vs.

GRANAT BROS., a corporation, and JOSEPH
GRANAT,

Defendants.

COMPLAINT FOR DECLARATORY
JUDGMENT

The plaintiff, Ralph D. Gomez, complains and
alleges:

I.

That the defendant Granat Bros., is a corporation duly organized and existing under and by virtue of the laws of the State of California, having a regular and established place of business at San Francisco, and doing business within the Northern District of the State of California, Southern Division.

II.

That the plaintiff is a resident of the City and County of San Francisco, State of California; that he is doing business under the firm name and style of Gomez Manufacturing Company at 609 Sutter Street, San Francisco, California; and that he is a citizen of the United States. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

III.

That this Court has jurisdiction of this cause of action because it is a suit for a declaratory judgment under the Judicial Code, Section 274-d of the Federal Declaratory Judgment Act, Title 28, Section 400 U.S.C. which arises from an actual controversy between the plaintiff and the defendant Granat Bros. as to the alleged infringement by plaintiff and/or others of United States Letters Patent Nos. 2,016,492 and 2,059,228 granted to Joseph Granat on October 8, 1935, and November 3, 1936, respectively, for combination engagement and wedding rings, and now claimed to be owned and/or controlled by the defendant Granat Bros.; and because it is a suit under the patent laws of the United States.

IV.

Upon information and belief plaintiff avers that Joseph Granat, in addition to being the patentee named in the said patents is an officer and director of the defendant corporation, and as such is actively engaged in the conduct of its business; that plaintiff has been and now is engaged in the business of manufacturing and selling jewelry; and the defendant, Granat Bros. is competitively engaged with plaintiff in the sale of ring ensembles of the type comprising a combination wedding and engagement ring.

V.

Plaintiff avers that the aforesaid patents and each of them is invalid and void for the reason that the patentee Joseph Granat was not the original first and sole inventor or discovered of the com-

bination engagement and wedding ring ensembles or any material or substantial parts thereof, but that said inventions disclosed and claimed in the aforementioned patents and all of the material and substantial parts thereof had been disclosed to the public by others, invented by another or others than Joseph Granat prior to the dates of the alleged inventions [2] of Joseph Granat and/or more than two years prior to the filing dates of the applications which resulted in the aforesaid patents, as appearing in divers printed publications and patents of United States, to-wit:

Thomas, No. 1,536,540—May 5, 1925.

Dayton, No. 1,724,130—Aug. 13, 1929.

Liebs, No. 1,758,447—May 13, 1930.

Harris, No. 2,000,228—May 7, 1935.

Gross, No. 2,077,234—April 13, 1937.

Cassell's Building Construction, by Henry Adams, published by Caswell and Company, Ltd., in 1906, pages 184-185.

Modern Cabinet Work by Wells, published by B. T. Batsford N. Y. in 1910, pages 42 and 43;

Building and Construction by Markham, published by Longman's Green and Co., 39 Paternoster Row, London, England, in 1913, page 254;

Practical Building Construction by Allen published by Crosby Lockwood & Son, Ludgate, England, in 1927, pages 250, 251; and other publications.

VI.

Plaintiff, on information and belief, avers that the said alleged inventions purported to be covered by the said Letters Patent Nos. 2,016,492 and 2,059,228 and particularly set forth in the claims thereof is devoid of substantial novelty in view of the well-known state of the prior art, and that it does not constitute patentable subject matter or invention or discovery within the meaning of the patent laws of the United States, and did not involve or require the exercise of the inventive faculty for its production, for which reason said letters patent are null, void and of no effect.

VII.

Plaintiff, on information and belief, avers the fact to be that Letters Patent No. 2,059,228 and each of the claims thereof are invalid and void for the following reasons: [3]

(a) Because in the prosecution of the application for said letters patent, and particularly by the limitations and restrictions made therein under the requirements of the Commissioner of Patents during the proceedings in the Patent Office while said application was pending therein, the claims of said letters patent were so limited by the acts of said Joseph Granat and his attorney that the alleged novelty of the claims of said letters patent does not constitute patentable novelty within the meaning of the patent laws of the United States, and that plaintiff is estopped from denying that the alleged novelty constituted merely certain features already known in the art.

(b) That the claims of the said letters patent are defective and void, in that each of them defines an old and exhausted combination, to-wit, an engagement ring and a wedding ring together with coupling means for holding the said rings in interlocked relationship; and that the said claims of said letters patent and each of them are invalid and void for the reason that they do not set forth a patentable combination or structure.

VIII.

That plaintiff, upon information and belief, further avers that the defendant Granat Bros. well knowing that the said patents and each of them, are invalid and of no force and effect, and that plaintiff has not committed any acts of infringement, has attempted and is now attempting to unlawfully and illegally capitalize the ownership of these invalid patents to the continuing irreparable damage and injury of this plaintiff and to the advantage of defendants.

IX.

That plaintiff, upon information and belief, avers that defendant Granat Bros., after the granting of the aforesaid patents, notified this plaintiff and one or more of plaintiff's [4] customers of the existence of said patents and of the alleged rights of defendant thereunder, and threatened to sue said plaintiff and his customer or customers because of their manufacture and sale of ring ensembles alleged to be infringements of the said patents; and

that this was done by said defendant because it well knew that such customer or customers would rather not go to the trouble and expense of retaining patent counsel to investigate the scope and validity of the patents aforesaid or the rights of the parties but would adopt the easiest and safest course of either discontinuing the sale of plaintiff's ring ensembles or purchasing similar ring combinations from said defendant.

X.

That this campaign of misrepresentation and intimidation has continued by repetition of the threats in letters, and that if this campaign by defendant Granat Bros., be allowed to continue, irreparable damage will be suffered by this plaintiff and by his customers.

XI.

That said campaign of intimidation and misrepresentation has resulted in considerable loss of business to this plaintiff and that he has lost and will continue to lose the goodwill of those of his customers who have been misled into believing that plaintiff has no right to manufacture and sell the ring ensembles aforesaid and which defendants claim infringe upon the said alleged patent rights.

XII.

That the volume of business done by this plaintiff is very substantial and that unless immediate relief is granted restraining and defendant Granat Bros. from engaging in a campaign of intima-

tion, harassment, and misrepresentation to plaintiff's customers the injury to plaintiff will be very great [5] and the damage to his reputation and business will be irreparable.

XIII.

That plaintiff has already been irreparably damaged both in his business and in his reputation to a degree which at this time cannot be estimated, but to the best of his knowledge and belief exceeds Three Thousand (\$3,000.00) Dollars.

Wherefore, plaintiff prays:

(a) That this Court enter a judgment or decree declaring that Joseph Granat is not the original, first and sole inventor of the subject matter set forth in and claimed by the aforesaid letters patent Nos. 2,016,492 and 2,059,228;

(b) That this Court enter a judgment or decree declaring the patents aforesaid and each of the claims thereof are invalid and void and of no effect in law;

(c) That this Court enter a judgment or decree declaring that it is the right of this plaintiff to continue the manufacture and sale of the said ring ensembles without threats, or other interference by or from the defendants or their agents, employees or officers;

(d) That this Court enter a temporary restraining order and injunction pendente lite, enjoining defendants from directly or indirectly threatening plaintiff or any of plaintiff's customers, present or

prospective, with suits or actions of any nature on account of the alleged infringement of the afore-said letters patent;

(e) That this Court issue a permanent injunction of the same purport and tenor as the preliminary injunction prayed for as above;

(f) That this Court order defendants to account to plaintiff for the damages, costs and expenses he has suffered and has been forced to expend by reason of the threats, acts of intimidation [6] and unwarranted practices of defendants, afore-said;

(g) That this Court order defendants to reimburse plaintiff for his costs herein expended.

/s/ J. E. TRABUCCO,
Attorney for Plaintiff.

/s/ RALPH D. GOMEZ,
Plaintiff.

[Endorsed]: Filed April 16, 1948. [7]

In the District Court of the United States for the
Northern District of California, Southern Division

Civil Action No. 28018-G

RALPH D. GOMEZ,

Plaintiff,

vs.

GRANAT BROS., a corporation, and JOSEPH
GRANAT,

Defendants,

and

GRANAT BROS., a corporation,

Cross-Plaintiff,

vs.

RALPH D. GOMEZ and WILLIAM HENDER-
SON, as individuals and co-partners, doing
business under the name and style of GOMEZ
MANUFACTURING COMPANY,

Cross-Defendants.

ANSWER OF DEFENDANTS

Granat Bros., and Joseph Granat, and Cross-Com-
plaint of Granat Bros., for Infringement of
Letters Patent No. 2,059,228, and Unfair Com-
petition.

Now come Granat Bros., a corporation, and Jo-
seph Granat, defendants above named, and an-
swering the complaint filed herein by plaintiff
above named admit, deny, and allege as follows:

First Defense

1. Plaintiff's complaint fails to state a claim against defendants or either of them upon which relief can be granted. [8]

Second Defense

2. Answering paragraph I of the complaint, defendants admit the allegations thereof.

3. Answering paragraph II of the complaint, defendants deny that plaintiff is doing business under the firm name and style of Gomez Manufacturing Company at 609 Sutter Street, San Francisco, California, or elsewhere.

4. Answering paragraph IV of the complaint, defendants deny that plaintiff has been or is now engaged in the business of manufacturing and selling jewelry, and further deny that defendant **Granat Bros.**, is competitively engaged with plaintiff in the sale of ring ensembles.

5. Answering paragraphs V, VI, VII and VIII of the complaint, defendants deny each and every allegation thereof.

6. Answering paragraph IX of the complaint, defendants deny that the alleged notices of infringement and threats of suit were sent or made or done for the reason or reasons alleged by plaintiff in said paragraph.

7. Answering paragraph X of the complaint, defendants deny each and every allegation thereof.

8. Answering paragraph XI of the complaint, defendants deny that there has been any campaign of intimidation or misrepresentation, and also deny that there is or has been any such intimidation or

misrepresentation which has resulted in any loss of business to plaintiff; defendants further deny that plaintiff has lost or will lose any good will of any of plaintiff's customers, and deny that plaintiff's customers have been misled by defendant in any manner.

9. Answering paragraphs XII and XIII of the complaint, defendants deny each and every allegation thereof. [9]

Third Defense

10. For a further and separate defense, defendants aver that plaintiff does not come into court with clean hands, in that, as defendants are informed and believe, plaintiff together with William Henderson doing business as co-partners under the name and style of Gomez Manufacturing Company, San Francisco, California, had sometime prior to the filing of this suit, made ring ensembles as set forth in one of said patents, and that after such manufacture and prior to the filing of this suit, said Gomez Manufacturing Company denied to defendants that said Gomez Manufacturing Company had ever made such rings, and sought to confuse defendant by stating to defendant that possibly defendants had been mistaken in identifying said Gomez Manufacturing Company as having made said ensembles; that at no time prior to the filing of this suit did plaintiff or said Gomez Manufacturing Company admit said manufacture, but sought, as defendants believe, to cause defendants to delay filing an action against plaintiff or said Gomez Manufacturing Company for infringement

of said Letters Patent, in order that plaintiff might first file this suit for declaratory judgment, and thereby create in the minds of the purchasing public, that plaintiff, and not defendants, is initiating the controversy on which this cause of action is based, and that defendants, and not plaintiff, are wrong-doers.

Fourth Defense

11. As a further and separate defense to this action, defendants allege that if any cause of action arises out of the subject matter of the complaint, such cause of action accrues to plaintiff and William Henderson as partners doing business under the firm name and style of Gomez Manufacturing Company; [10] that said William Henderson is a citizen of the State of California and a resident of this district, is subject to the jurisdiction of this court, as to both service of process and venue; that said William Henderson can be made a party without depriving this court of jurisdiction of the present parties, and has not been made a party nor joined as a party plaintiff in this action; and that the real parties in interest are not named in this action.

Wherefore, defendants pray that:

- (a) The court dismiss the complaint;
- (b) The plaintiff take nothing by this suit.
- (c) Costs of suit and reasonable attorney's fees be awarded defendants; and
- (d) The court award such other and further relief as may be just. [11]

CROSS-COMPLAINT

First Cause of Action

Defendant Granat Bros., cross-plaintiff, complains against plaintiff Ralph D. Gomez, William Henderson and Gomez Manufacturing Company, cross-defendants, for a cause of action for patent infringement and alleges:

I.

Jurisdiction is founded on the existence of a federal question and the matter in controversy, in that the action arises under the patent laws of the United States and jurisdiction is particularly conferred by Title 28 U.S.C.A. Section 41(7), as hereinafter more fully appears. As hereinafter more fully appears cross-defendants are residents of and have regular and established places of business in the Northern District of California, Southern Division, and have committed acts of infringement herein complained of in said District and Division.

II.

Cross-plaintiff, Granat Bros., is and was at all times herein mentioned a corporation duly incorporated under the laws of the state of California, having its principal offices at San Francisco, California, and doing business throughout the said Southern Division of the Northern District of California and elsewhere in the United States.

III.

Cross-defendants, Ralph D. Gomez and William Henderson at all times herein mentioned were and now are co-partners doing business under the firm

name and style of Gomez Manufacturing Company and were and now are citizens and residents of the State of California, residing within the Northern District of California, Southern Division, and having at all times herein mentioned a [12] regular and established place of business in San Francisco, California.

IV.

On November 3, 1936, United States Letters Patent No. 2,059,228 were duly and regularly issued to Joseph Granat for an invention in a locked ring ensemble.

V.

That at least six (6) years prior to April 19, 1948, cross-plaintiff acquired the entire, right, title, and interest in and to said Letters Patent No. 2,059,228; that thereafter to wit on April 19, 1948, said Joseph Granat by an instrument in writing further assigned said Patent No. 2,059,228 to cross-plaintiff together with the full and sole right to commence and maintain any and all suits for past infringement of said patent, including suits for enjoining infringement, and to recover all damages by reason of said past infringement. Ever since at least six years prior to the filing of this complaint, cross-plaintiff has been and now is the owner of said Letters Patent.

VI.

Cross-defendants have for a long time past been and still are infringing said Letters Patent by making, using and selling locked ring ensembles embodying the patented invention, and will continue to do so unless enjoined by the court.

VII.

Cross-plaintiff has placed the required statutory notice on all locked ring ensembles manufactured and sold by it under said Letters Patent, and has given written notice to cross-defendants of their said infringement.

VIII.

Cross-defendants have denied that they have ever made [13] said ring ensembles prior to the receipt of cross-plaintiff's notification of infringement of said letters patent, and cross-plaintiff therefore asserts that the acts of infringement by cross-defendants must necessarily have been wholly wilful and committed with intent to cause injury and damage to cross-plaintiff.

Second Cause of Action

Cross-plaintiff complains of cross-defendants, Ralph D. Gomez, William Henderson, and Gomez Manufacturing Company for a second cause of action for unfair competition and alleges:

IX.

Jurisdiction is founded on the fact that the acts constituting unfair competition grow out of and are grounded upon the acts constituting the infringement set forth in said First Cause of Action. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00.

X.

Cross-plaintiff refers to and makes a part hereof each and every, all and singular, the allegations contained in said First Cause of Action.

XI.

Cross-plaintiff avers that ever since the issuance of said letters patent, cross-plaintiff Granat Bros., has pioneered on a national basis, and has established a large and lucrative business of the manufacture and sale of interconnecting ring ensembles of the general and specific types embodied in said letters patent, and has succeeded in creating for said business a very valuable good will and reputation all over the United States; that cross-defendants, as cross-plaintiff is [14] informed and believes, well knowing said good will and reputation, and never having made or sold any rings of said type for more than a few months prior to the date of this suit, are seeking to convert to and have in fact converted to cross-defendants' own benefit a substantial part of said good will and reputation, by manufacturing and selling said rings without authority from cross-plaintiff, all to the material injury and damage of said good will and reputation of cross-plaintiff.

XII.

Cross-plaintiff avers on information and belief, that cross-defendants had sometime prior to the filing of this suit for declaratory judgment, made ring ensembles as embodied in one of the cross-plaintiff's patents in issue, and that after such manufacture and prior to the filing of such suit, cross-defendants denied to cross-plaintiff that cross-defendants had ever made such rings, and sought to confuse cross-plaintiff by stating to cross-plaintiff

that possibly cross-plaintiff had been mistaken in identifying cross-defendants as having made said rings; that said denial on the part of cross-defendants, as cross-plaintiff believes, was made so as to, and did, enable cross-defendant to secretly manufacture and sell large numbers of said infringing rings to various dealers before cross-plaintiff discovered same and brought suit for infringement; that cross-defendants did not at any time between the time of their said denial and the bringing by them of said suit for declaratory judgment, inform cross-plaintiff of said manufacture and/or the sale of said rings: that such information was withheld from cross-plaintiff, as cross-plaintiff is informed and believes, to cause cross-plaintiff to delay filing an action against cross-defendants for infringement of said Letters Patent, in order that [15] cross-defendants could first file said suit for declaratory judgment, and thereby create in the jewelry trade and in the minds of the purchasing public, that cross-defendants, and not cross-plaintiff, are initiating the controversy on which this action is based, and that cross-plaintiff, and not cross-defendants, is the wrong-doer; that as a result of said secret and extensive manufacture and sale of said rings and the premature filing of said suit by cross-defendants, a great deal of confusion has been created in the jewelry trade and particularly in the minds of dealers and customers of cross-plaintiff who were and are purchasers of such rings as manufactured by cross-plaintiff; and that said confusion on the part of said dealers and customers has and will

continue to greatly impair the good will and reputation which cross-plaintiff has over the years created in connection with its jewelry business and particularly in connection with the manufacture and sale of said ring ensembles.

Wherefore Cross-Plaintiff demands that:

(a) The court order William Henderson and Gomez Manufacturing Company to be made parties cross-defendants to respond to the Cross-Complaint herein; and

(b) A preliminary and final injunction against further infringement by cross-defendants and by each of them, and those controlled by said cross-defendants and by each of them be issued, and an accounting for profits and damages, an assessment of interest and costs against cross-defendants, and a reasonable attorney's fee be granted to cross-plaintiff; and

(c) Treble damages be awarded cross-plaintiff for the wilful nature of the infringement; and

(d) Damages in the amount of \$50,000.00 be awarded cross-plaintiff for the acts of unfair competition on the part [16] of cross-defendants; and

(d) The court grant such other and further relief as may be just.

JOSEPH B. GARDNER,
Attorney for Defendants and
Cross-Plaintiff.

(Acknowledgment of Service.)

[Endorsed]: Filed May 10, 1948. [17]

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

Answering the cross-complaint on file herein, cross-defendants Ralph D. Gomez and William Henderson, co-partners doing business under the firm name and style of Gomez Manufacturing Company, allege as follows:

I.

These cross-defendants admit they are residents of the Northern District of California, but deny they have committed acts of [18] infringement herein or elsewhere in the United States.

II.

Admit the allegations set forth in Paragraph II of the cross-complaint.

III.

Admit that they are citizens and residents of the Northern District of the State of California, and that they are doing business under the firm name and style of Gomez Manufacturing company.

IV.

Admit that United States Letters Patent No. 2,059,228 were issued to Joseph Granat but deny the validity thereof.

V.

These cross-defendants do not deny the allegations set forth in Paragraph V of the cross-complaint.

VI.

Deny the allegations set forth in paragraph VI of the cross-complaint.

VII.

Deny the allegations set forth in paragraph VII of the cross-complaint.

VIII.

Deny the allegations set forth in paragraph VIII of the cross-complaint.

IX.

The cross-defendants are uninformed as to all of the allegations set forth in paragraphs IX of the cross-complaint and therefore leave it to the cross-plaintiffs to make such proofs as they consider advisable.

X.

These cross-defendants refer to and make a part hereof the statements given in answer to the allegations set forth in the [19] first cause of action of the cross-complaint.

XI.

Deny the allegations set forth in paragraph XI of the cross-complaint.

XII.

These cross-defendants deny each and all of the allegations set forth in paragraph XII of the cross-complaint, and more specifically they deny having made false and untrue statements concerning their

manufacturing activities, or that they sought to confuse cross-plaintiffs or either of them, or that any statements or denials were made for the purpose of enabling cross-defendants to secretly manufacture and sell large numbers of ring ensembles, or that the cross-plaintiffs were misled into assuming that cross-defendants would discontinue manufacturing ring ensembles while an investigation was underway with respect to the charges of infringement preferred against cross-defendants or either of them, or that this suit for declaratory judgment was commenced for the purpose of influencing the purchasing public into believing that cross-plaintiffs or either of them are wrong doers, or that cross-defendants secretly manufactured and sold ring ensembles, or that any confusion has been created in the jewelry trade, or that either the good will or reputation of cross-plaintiffs has been impaired by reason of any actions of these cross-defendants or by reason of the commencement of this action for declaratory judgment.

Further answering the allegations set forth in paragraph XII of the cross-complaint these cross-defendants aver that soon after they commenced the manufacture of ring ensembles a letter dated March 18, 1948, from Joseph B. Gardner, attorney for Granat Bros., was addressed to Ralph Gomez, one of the cross-defendants, charging him with infringing U. S. Patent Nos. 2,016,492 and 2,059,228; that upon receipt of said letter said Gomez telephoned [20] J. E. Trabucco, his attorney, who thereupon advised him that a complete search of the prior art should be made for the purpose of as-

certaining whether the said patents were valid and infringed; that a letter dated March 19, 1948, was thereupon sent to Mr. Gardner requesting time for the investigation of the infringement matter; that Mr. Gardner on March 20, 1948, replied by letter that unless a definite statement was received within twenty days the commencement of legal proceedings would be justified; that a search of the patent office records was immediately commenced to ascertain the state of the prior art, and a copy of the file history of one of the said Granat patents was also ordered; that prior to the expiration of the twenty days stated by Mr. Gardner to be the end of the period for withholding suit against Gomez, to wit, on April 5, 1948, a letter was sent by Mr. Gardner to the H. Morton Company of Oakland, California, a customer of cross-defendants, accusing the said firm of infringing the two patents in suit; that the cross-defendants were thereupon notified by H. Morton Company that the Gomez ring ensembles then on hand would be returned; that soon thereafter, to wit, on April 13, 1948, Mr. Gardner called Trabucco on the telephone and inquired as to what decision had been made with respect to the infringement matter, the reply being that it was thought the matter would be contested in court; that on April 15, 1948, a letter was sent to Mr. Gardner confirming the telephone conversation of two days previous thereby advising him of the intention of Mr. Gomez to contest the charge of infringement; that cross-defendant Gomez was advised by counsel that the sending of threatening letters of the type addressed to H. Morton Company to customers of

Gomez Manufacturing Company by Granat Bros., or its attorney, might continue indefinitely without suit for infringement ever being commenced; that upon being so advised and knowing full well that the business and good [21] will of Gomez Manufacturing Company would be jeopardized and irreparably damaged should the letters charging its customer with infringement be continued by cross-plaintiffs, cross-defendant Gomez instructed his attorney to commence this suit for declaratory judgment; and that the commencement of the said suit for declaratory judgment was initiated for the sole purpose of protecting the business and good will of the cross-defendants.

XIII.

Further answering the cross-complaint on file herein the cross-defendants refer to and make a part hereof each and all of the allegations set forth in paragraphs V, VI and VII of their complaint on file herein.

Wherefore, cross-defendants pray that the cross-complaint on file herein be dismissed; that the letters patent in suit be held invalid or in the alternative not infringed; that cross-defendants be awarded costs of suit and reasonable attorneys fees; and for such other relief as may appear to the Court to be just.

/s/ J. E. TRABUCCO,
Attorney for Plaintiff and
Cross-Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed May 17, 1948. [22]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties hereto through their respective counsel as follows:

1. That the plaintiffs-cross-defendants are Ralph D. Gomez and William Henderson, copartners doing business under the [23] name and style of Gomez Manufacturing Company and having their place of business at San Francisco, California.

2. That defendant - cross - complainant Granat Bros. is a corporation duly organized under the laws of the State of California, having its principal place of business at San Francisco, California, and defendant-cross-complainant Joseph Granat, an individual, is a resident of San Francisco, California.

3. That an actual controversy exists between the plaintiffs-cross-defendants and defendants-cross-complainants hereto as to the validity of United States Letters Patent No. 2,059,228.

4. That on November 3, 1936, United States Letters Patent No. 2,059,228 were issued by the United States Patent Office to Joseph Granat.

5. That the entire right, title and interest in and to said United States Letters Patent No. 2,059,228 were assigned to defendant-cross-complainant Granat Bros. by Joseph Granat, and that the entire

interest in and to said Letters Patent was at the time of filing the complaint and now is owned by defendant-cross-complainant Granat Bros.

6. That the charge or charges of the complaint as to United States Letters Patent No. 2,016,492 are dismissed without prejudice.

7. That if this Court finds that United States [24] Letters Patent No. 2,059,228 is valid, plaintiffs-cross-defendants Ralph D. Gomez and William Henderson admit that the ring ensemble manufactured and sold by them infringes the claims of said United States Letters Patent No. 2,059,228, it being understood that plaintiffs-cross-defendants Ralph D. Gomez and William Henderson deny the validity of United States Letters Patent No. 2,059,228.

8. That defendants-cross-complainants dismiss without prejudice the Second Cause of Action set forth in their Cross-Complaint on file herein.

9. That uncertified printed copies of Letters Patent of the United States and that photostatic copies of printed publications shall be received in evidence, when offered in evidence by either party with the same force and effect as the certified copies of Letters Patent or original copies of publication, subject to correction by competent evidence as to any errors therein appearing.

10. That Ralph D. Gomez and William Henderson, as copartners doing business under the name and style of Gomez Manufacturing Company, may be substituted as plaintiffs for the named

plaintiff in the complaint on file herein, and that all allegations of complaint may be deemed to be made on behalf of said substituted plaintiffs and that the answer to the complaint on file herein be deemed a complete answer to all of the allegations of the complaint made on behalf of the substituted plaintiffs.

/s/ J. E. TRABUCCO

Attorney for Plaintiffs-
Cross-Defendants.

MELLIN AND HANSCOM

By /s/ JACK E. HURSH,

Attorneys for Defendants-
Cross-Complainants.

San Francisco, California

Dated: September 14, 1948

So ordered.

/s/ LOUIS E. GOODMAN

District Judge

[Endorsed]: Filed Sept. 14, 1948. [25]

[Title of District Court and Cause.]

NOTICE OF ADDITIONAL PRIOR ART

To defendants and cross-complainant above named,
and to Messrs. Oscar A. Mellin and Mellin and
Hanscom, their attorneys:

You, and each of you, will please take notice
that the following patents and publication, in addition to those heretofore listed in the complaint on

file herein, will be relied upon at the trial of the cause to prove that Joseph Granat was not the original, first and sole inventor of the locked ring ensemble disclosed and claimed in United States Letters Patent 2,059,228: [26]

Kelly, 152,233—June 23, 1874

Kaas et al., 424,211—Mar. 25, 1890

Bullard, 464,749—Dec. 8, 1891

Linderman, 517,348—Mar. 27, 1894

Grierson, 959,854—May 31, 1910

Atkinson, 942,047—Dec. 7, 1909

Tschirgi, 1,482,772—Feb. 5, 1924

Beaujard, 1,712,417—May 7, 1929

Hubbard, 1,715,293—May 28, 1929

Mittleburg, 1,829,366—Oct. 27, 1931

Birnbaum, 1,877,750—Sept. 13, 1932

Chats on Old Jewelry and Trinkets, by MacIver

Percival, published by Frederick A. Stokes Company, New York, N. Y., in 1912, page 267.

Dated: September 24, 1948.

/s/ J. E. TRABUCCO,

Attorney for Plaintiffs and
Cross-Defendants

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 1, 1948. [27]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

Ordered:

The complaint is dismissed. The cross-complainants may take a decree upon findings to be

presented pursuant to the Rules, for an injunction and for an accounting of profits and damages and costs. Attorney fees will be fixed upon settlement of the Master's report.

Dated: November 24, 1948.

/s/ LOUIS E. GOODMAN

United States District Judge

[Endorsed]: Filed Nov. 26, 1948. [28]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1.

That Ralph D. Gomez and William Henderson, plaintiffs and cross-defendants, are residents within the Northern District of California, Southern Division, and are there doing business as copartners under the name and style of Gomez Manufacturing Company.

2.

That Granat Bros., defendant and cross-plaintiff, is a California corporation, having its principal place of business within the Northern District of California, Southern Division.

3.

That defendant-cross-plaintiff, Granat Bros., is the owner of all the right, title and interest in the patent in suit No. 2,059,228.

4.

That the patent in suit No. 2,059,228 was duly and regularly issued and is good and valid in law.

5.

That the claims of the patent in suit are not for an exhausted or old combination but properly define a patentable invention. [30]

6.

That prior to and at the time of filing the complaint herein an actual controversy existed between plaintiffs-cross-defendants and defendant cross-plaintiff as to the validity of United States Letters Patent No. 2,059,228.

7.

That long prior to the defendant-cross-complainant's production of the ring ensemble or set corresponding to that illustrated, described and claimed in the patent in suit No. 2,059,228, in the year 1934, there was a recognized need or want in the jewelry trade for a wedding and engagement ring set which would latch together to prevent relative rotation and axial movement between the rings when worn upon a finger.

8.

That prior to defendant-cross-plaintiff's production in 1934 of the ring ensemble or set illustrated, described and claimed in the patent in suit No. 2,059,228 there were no ring ensembles or sets on the market or offered for sale commercially in which the rings would latch together to prevent relative rotation and axial movement between the rings when worn upon the finger.

9.

That defendant-cross-plaintiff's production in 1934 of a ring ensemble or set corresponding to that illustrated, described and claimed in the patent in suit No. 2,059,228 satisfied the long felt want or need in the jewelry trade for a wedding and engagement ring set which would latch together and [31] prevent relative rotation and axial movement between the rings when worn upon the finger.

10.

That immediately upon defendant-cross-complainant's production in 1934 of ring ensembles or sets corresponding with that illustrated, described and claimed in the patent in suit No. 2,059,228 there was an immediate and widespread commercial demand for defendant-cross-plaintiff's said ring ensembles or sets all over the entire United States, and defendant-cross-plaintiff, commencing with the year 1934 and continuing to the filing of the complaint herein, each year sold ~~thousands of sets~~ approximately \$125,000 worth of sets [L.E.G.] of said patented ring ensembles and sets all over the United States.

11.

That despite the widespread commercial success of defendant-cross-complainant's rings corresponding to the patent in suit No. 2,059,228 during the years commencing with 1934 and extending to the year 1948, the jewelry trade completely refrained from in any manner imitating the patented ring ensemble or set.

12.

That while the prior art offered in evidence discloses wedding and engagement rings which latch together, the rings illustrated, described and claimed in the patent in suit accomplish that result in a manner substantially different than the prior art and by means substantially different than the prior art and produce the old result in a novel and improved manner. [32]

13.

That the ring construction illustrated, described and claimed in the patent in suit No. 2,059,228 was not an obvious mechanical expedient for accomplishing the result, and its production involved more than the skill of one skilled in the art and constitutes invention.

14.

That the ring construction illustrated, described and claimed in the patent in suit No. 2,059,228 was not the result of mere mechanical skill but was the result of the inventive faculty.

15.

That the patentee of the patent in suit by producing the ring ensemble or set illustrated, described and claimed in the patent in suit was the first in the art to provide a commercially practical ring ensemble or set of a wedding ring and engagement ring capable of being latched together to prevent relative rotation and axial movement when worn upon the finger.

16.

That although dovetail, tongue and groove or mortise and tenon devices were widely used in furniture making and the like and in the machinery business in general, the conception and practical application of the principle thereof to wedding and engagement ring ensembles to accomplish the result of preventing relative rotation and axial movement between such rings was the result of more than mere mechanical skill and was [33] the result of invention.

17.

That the prior art before the Patent Office was the most pertinent prior art on the subject of the patent in suit, and that the additional prior art offered in evidence was no closer to the patent in suit than that which was before the Patent Office during the prosecution of the application which resulted in the patent in suit.

18.

That the invention forming the subject matter of the patent in suit is not anticipated by the prior art in evidence herein.

19.

That defendant - cross - plaintiff's commercially successful ring ensembles were substantially identical in construction and mode of operation with that illustrated, described and claimed in the patent in suit No. 2,059,228.

20.

That plaintiffs-cross-defendants' accused ring ensembles or sets are substantially identical in con-

struction and mode of operation to the ring ensemble illustrated, described and claimed in the patent in suit No. 2,059,228 and a substantial copy of defendant-cross-plaintiff's commercial ring ensemble made under that patent as far as the connecting means between the rings is concerned. [34]

21.

That the ring ensembles or sets here accused as an infringement infringe the claims of the patent in suit.

22.

That plaintiffs'cross-defendants' infringement of the patent in suit No. 2,059,228 was done knowingly and deliberately and in ~~wanton~~ [L.F.G.] disregard of said patent No. 2,059,228 and defendant-cross-plaintiff's rights thereunder.

23.

That defendant-cross-plaintiff, Granat Bros., has been damaged in an amount equal to eight per cent (8%) of the retail sales price of the infringing rings manufactured and sold by or for plaintiffs-cross-defendants.

CONCLUSIONS OF LAW

1.

That this Court has jurisdiction of the subject matter and of the parties.

2.

That the patent in suit No. 2,059,228 was regularly issued in accordance with law and that the claims thereof are presumptively valid.

3.

That plaintiffs-cross-defendants offered no evidence sufficient to overcome the presumption of validity of the [35] patent in suit No. 2,059,228.

4.

That the patent in suit No. 2,059,228 and each of the claims thereof is good and valid in law.

5.

That plaintiffs-cross-defendants have infringed the claims of the patent in suit No. 2,059,228 by the manufacture and sale of ring ensembles coming within the scope of the claims of the patent in suit.

6.

That defendant-cross-complainant, Granat Bros., is entitled to a judgment against plaintiffs-cross-defendants for damages in a sum equal to eight per cent (8%) of the retail selling price of ring ensembles manufactured and sold by or for plaintiffs-cross-defendants.

7.

That defendant-cross-complainant, Granat Bros., is entitled to an accounting to determine the extent of the manufacture and sale of infringing ring ensembles by or for plaintiffs-cross-defendants.

8.

That defendant-cross-complainant, Granat Bros., is entitled to a judgment against plaintiffs-cross-defendants awarding defendant-cross-complainant, Granat Bros., an injunction to be issued out of and under the seal of this Court, enjoining [36] plain-

tiffs-cross-defendants, and each of them, their associates, attorneys, employees, servants and those in privity with them, from in any manner manufacturing or selling or offering for sale ring ensemble sets coming within the scope of the claims of the patent in suit No. 2,059,228.

9.

That defendant-cross-complainant, Granat Bros., is entitled to a judgment against the plaintiffs-cross-defendants for its costs of suit herein.

10.

That due to the knowing, deliberate and intentional infringement of the patent in suit by the plaintiffs-cross-defendants, defendant - cross - complainant, Granat Bros., is entitled to a judgment against the plaintiffs-cross-defendants for reasonable attorneys' fees.

11.

That defendant-cross-complainant, is entitled to a judgment dismissing the complaint herein.

Dated this 6th day of December, 1948.

/s/ LOUIS E. GOODMAN,

United States District Judge.

A receipt of a copy of the within Findings of Fact and Conclusions of Law is admitted this 29th day of November, 1948.

/s/ J. E. TRABUCCO,

Attorney for Plaintiffs.

Approved as to form, J. E. Trabucco, Attorney for Plaintiffs.

[Endorsed]: Filed Dec. 6, 1948. [37]

In the United States District Court Northern
District of California, Southern Division

Civil Action—No. 28018-G

RALPH D. GOMEZ,

Plaintiff,

vs.

GRANAT BROS., a corporation, and JOSEPH
GRANAT,

Defendants,

and

GRANAT BROS., a corporation,

Cross-Plaintiff,

vs.

RALPH D. GOMEZ and WILLIAM HENDER-
SON, as individuals and copartners, doing business
under the name and style of GOMEZ MANUFAC-
TURING COMPANY,

Cross-Defendants.

JUDGMENT

This cause having come on to be heard upon the issues raised by the complaint for declaratory judgment and answer, and the cross-complaint and answer to the cross-complaint, and the Court having filed its Findings of Fact and Conclusions of Law, It is ordered, adjudged and decreed:

1. That plaintiffs-cross-defendants, Ralph D. Gomez and William Henderson, reside within the Northern District of California, Southern Division, and are there doing business as copartners under

the name and style of Gomez Manufacturing Company.

2. That Granat Bros., defendant-cross-plaintiff is a California corporation, having its principal place of business within the Northern District of California, Southern Division.

3. That this Court has jurisdiction of this cause and of the parties.

4. That the defendant and cross-plaintiff, Granat Bros., is the owner of the legal title of the patent in suit No. 2,059,228.

5. That the patent in suit No. 2,059,228 and each of the claims thereof is good and valid in law.

6. That the plaintiffs-cross-defendants, Ralph D. Gomez and William Henderson, have infringed the claims of the patent in suit No. 2,059,228.

7. That the complaint herein be and the same is hereby dismissed as to the defendants and cross-complainants.

8. That a writ of injunction issue out of and under the seal of this Court enjoining and restraining the plaintiffs-cross-defendants, and each of them, their associates, attorneys, employees, servants, and those in privity with them, from in any manner manufacturing or selling or offering for sale ring [39] ensemble sets coming within the scope of the claims of the patent in suit No. 2,059,228.

9. That the matter be referred to Commissioner Fox to act as a Master to make and render an ac-

count as to the extent of the manufacture and sale of infringing ring ensembles by or for plaintiffs-cross-defendants, and that the defendant-cross-complainant recover as damages from the plaintiffs-cross-defendants a sum equal to eight per cent (8%) of the retail sales price of the infringing rings manufactured and sold by or for plaintiffs-cross-defendants.

10. That the defendant-cross-complainant, Granat Bros., recover from the plaintiffs-cross-defendants reasonable attorneys' fees in this suit to be fixed by this Court upon the settlement of the Master's report upon the accounting.

11. That defendants and cross-complainant recover their costs and disbursements in this suit in the sum of Twenty six and 24/100 Dollars (\$26.40) and have execution therefor.

Dated: this 6th day of December, 1948.

/s/ LOUIS E. GOODMAN,

United States District Judge.

Approved as to form J. E. Trabucco, Attorney for Plaintiffs.

A receipt of a copy of the within Judgment is admitted this 29th day of November, 1948.

/s/ J. E. TRABUCCO,

Attorney for Plaintiffs.

Entered in Civil Docket Dec. 7, 1948.

[Endorsed]: Filed Dec. 6, 1948. [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Ralph D. Gomez and William Henderson, co-partners doing business under the name and style of Gomez Manufacturing Company, plaintiffs-cross-defendants in the above entitled case, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this case by the Honorable Louis E. Goodman on December 7th, 1948, holding the patent in suit valid and infringed, and dismissing plaintiff's complaint, and from the findings of fact, conclusions of law and the rulings which [41] were adverse to plaintiffs-cross-defendants.

RALPH D. GOMEZ AND WILLIAM HENDERSON, doing business under the name and style of **GOMEZ MANUFACTURING COMPANY**.

By /s/ J. E. TRABUCCO,
Their Attorney.

(Acknowledgement of Service.)

[Endorsed]: Filed Dec. 20, 1948. [42]

The Fidelity and Casualty Company of New York

In the United States District Court for the Northern
District of California, Northern Division

No. 28018-G

RALPH D. GOMEZ, and WILLIAM HENDER-
SON, co-partners doing business under the name
and style of GOMEZ MANUFACTURING
COMPANY,

Plaintiffs,

vs.

GRANAT BROS., a corporation, and JOSEPH
GRANAT,

Defendants.

GRANAT BROS., a corporation,

Cross-Plaintiffs,

vs.

RALPH D. GOMEZ and WILLIAM HENDER-
SON, as individuals and co-partners doing busi-
ness under the name and style of GOMEZ
MANUFACTURING COMPANY,

Cross-Defendants.

UNDERTAKING ON APPEAL AND TO STAY EXECUTION

Whereas, the plaintiffs and cross-defendants,
Ralph D. Gomez and William Henderson, as indi-
viduals and co-partners doing business under the
name and style of Gomez Manufacturing Company,
in the above-entitled action has appealed, or is
about to appeal, to the United States Circuit Court
of Appeals for the Ninth District from a judgment
or order made and entered against them in said

action in the court named in the caption hereof, in favor of the defendants-cross-plaintiff in said action on the 7th day of December, 1948 and said District Court has ordered the suspension of the order or judgment, issued of said action, pending the determination of said appeal by the said Circuit Court of Appeals upon the posting of this bond.

Now, Therefore, in consideration of the Premises, and of such appeal, the undersigned, The Fidelity and Casualty Company of New York, a New York corporation, authorized to act as sole surety under the laws of the United States, does hereby undertake and promise on the part of Ralph D. Gomez and William Henderson, co-partners doing business under the name and style of Gomez Manufacturing Company, plaintiffs and cross-defendants, and acknowledges itself bound in the sum of one thousand and no/100ths (\$1,000.00) dollars plus costs in the penal sum of two hundred fifty and no/100ths dollars (\$250.00) that the said Plaintiffs-Cross-Defendants will pay the amount to be directed to be paid by the judgment or order in full together with interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award.

This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

In Witness Whereof, the Surety has caused this undertaking to be executed and its corporate seal

affixed by its duly authorized attorney, this 20th day of December, 1948.

THE FIDELITY AND CASUALTY INSURANCE COMPANY OF NEW YORK,

(Seal) By /s/ F. M. REIMERS,
Attorney.

Approved this 20th day of Dec., 1948.

/s/ LOUIS E. GOODMAN,
Judge of the U. S. District Court.

State of California,
City and County of San Francisco—ss.

On this 20th day of December in the year One Thousand Nine Hundred and Forty-eight, before me, C. I. Treganowen, a Notary Public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared F. M. Reimers known to me to be the attorney of The Fidelity and Casualty Company of New York, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the City and County of San Francisco, the day and year in this certificate first above written.

(Seal) /s/ C. I. TREGANOWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Oct. 26, 1952.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the United States District Court for the Southern Division in the Northern District of California:

You are hereby requested to certify as the record on appeal in the above-entitled case to be filed in the United States Circuit Court of Appeals for the Ninth Circuit for use in [44] the appeal the following material:

1. The Complaint for Declaratory Judgment.
2. The Answer and Cross-Complaint.
3. The Answer to the Cross-Complaint.
4. The Stipulation (dated September 14, 1948).
5. The Notice of Additional Prior Art.
6. The Findings of Fact and Conclusions of Law.
7. The Judgment.
8. Plaintiffs'-cross-defendants' exhibits:

No. 1.—Printed copy of the Granat patent in suit No. 2,059,228.

No. 2.—Certified copy of the file wrapper and contents of the Granat patent in suit. (Physical Exhibit.)

No. 3.—The Book of Prior Art patents containing 12 printed copies of U. S. Patents. (Physical Exhibit.)

No. 4.—Printed copy of Granat patent No. 1,982,864. (Physical Exhibit.)

No. 5.—Catalogue entitled "Jewelers' Circular Keystone." (Physical Exhibit.)

9. Defendant-cross-plaintiff's exhibits:

A, B, and C.—Wedding and engagement ring ensembles. (Physical Exhibits.)

D.—Advertisements. (Physical Exhibits.)

E.—Ring ensemble marked on deposition of Ralph D. Gomez as Exhibit A for Identification. (Physical Exhibit.)

F.—Newspaper advertisement appearing in Humboldt Times. (Physical Exhibit.)

G.—Printed copy of Dayton patent No. 1,724,130. (Physical Exhibit.)

H.—Sketch marked on deposition of Ralph D. Gomez as Exhibit D for identification. (Physical Exhibit.)

I.—Ring ensemble comprising a wedding and an engagement ring. (Physical Exhibit.) [45]

(Those exhibits above designated as "Physical Exhibits" are not to be bound with the record but are to be transmitted as physical exhibits.)

10. Reporter's transcript of deposition of Joseph Granat taken on behalf of plaintiffs-cross-defendants commencing on page 2, line 5, of the transcript, omitting the following: page 5 lines 2 through 26; omitting all of pages 6, 7 and 8; omitting from page 9 lines 1 through 12 and also omitting from this same page lines 22, and 23; and omitting the last unnumbered page.

11. Reporter's transcript of deposition of Ralph D. Gomez, taken on behalf of defendant-cross-plaintiff commencing on page 3 at line 11, and omitting the following: page 4, lines 6 through 25; omitting from page 12 lines 2 through 26; omitting from page 13 lines 1 through 8; omitting from page 14

lines 16 through 26; omitting from page 15 lines 1 through 26; omitting all of pages 16 and 17; omitting from page 18 lines 1 through 23; omitting from page 21 lines 11 through 21; omitting from page 26 lines 18 through 26; omitting all of page 27; omitting from page 28 lines 1 and 2; omitting all of pages 29, 30 and 31.

12. Transcript of the evidence and proceedings before Judge Louis E. Goodman on November 12, 1948, omitting pages 1 to 18 inclusive (excepting lines 6, 7, 11, 12, 13, 14 and 15 of page 4; lines 5, 6, 7, 8 and 9 of page 5; lines 15 and 16 of page 8; lines 22, 23 24 and 25 of page 10, which lines are to be included in the printed record); omitting from page 19 lines 1 through 16; omitting from page 21 lines 3 through 25; omitting all of page 22; omitting from page 23 lines 1 through 5; omitting from page 26 lines 23 through 25; omitting from page 27 lines 1 through 12 and also omitting from this same page lines 16 through 25; omitting from page 28 lines 1 through 8 and also omitting from this same page lines 10 through 25; omitting all of pages 29, 30, 31, 32 and 33; omitting from page 34 lines 1 through 23; omitting from page 35 lines 1 through 4; and also omitting from this same page lines 8 through 11; omitting from page 36 lines 1 through 5; omitting from page 57 lines 20 through 25; omitting all of pages 58 and 59; omitting from page 60 lines 1 through 3; omitting from page 66 lines 19 through 26; omitting from pages 67, 68, 69 and 70; omitting from page 71 lines 11 [46] through 25; omitting all of page 72; omitting

from page 73 lines 1 through 20; omitting from page 74 lines 16 through 25; omitting from page 75 lines 1 through 5 and also omitting from this same page lines 12 through 25; omitting all of pages 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90 and 91; omitting from page 93 the last two lines; omitting from page 95 lines 12 through 25; omitting all of pages 96, 97 and 98.

13. Notice of Appeal.

14. Statement of Points Relied Upon.

15. Bond on Appeal.

16. This designation of Contents of Record on Appeal.

17. Clerk's Certificate.

/s/ J. E. TRABUCCO,

Attorney for Plaintiff-Cross-
Defendants.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 20, 1948. [47]

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON

Now come the plaintiffs-cross-defendants, Ralph D. Gomez and William Henderson, co-partners doing business under the name and style of Gomez Manufacturing Company, by their attorney, and having filed an appeal in the United States Court of Appeals for the Ninth Circuit from the

final judgment heretofore entered in the above-entitled case on or about December 7, 1948, finding in favor of the defendants-cross-plaintiff, and [48] state that upon their appeal they will rely upon the following points:

1. That the Court erred in holding the patent in suit No. 2,059,228 is good and valid in law. (Finding of Fact No. 4; Conclusion of Law No. 4.)

2. That the Court erred in holding that the claims of the patent in suit are not for an exhausted or old combination and that they define a patentable combination. (Finding of Fact No. 5.)

3. That the Court erred in holding that there were no latched ring ensembles offered for sale commercially or on the market prior to the production of the ring ensemble illustrated, described and claimed in the patent in suit. (Finding of Fact No. 8.)

4. That the Court erred in holding that the jewelry trade refrained from imitating the defendant-cross-plaintiff's patented ring ensemble from 1934 to 1948. (Finding of Fact No. 11.)

5. That the Court erred in holding that the rings of the patent in suit latch together in a manner substantially different than the finger rings shown in the prior art, and that the rings of the patent in suit produce an old result in a novel and improved manner. (Finding of Fact No. 12.)

6. That the Court erred in holding that the ring construction of the patent in suit was not an

obvious mechanical expedient for latching two rings together and that its production involved more than mechanical skill and constituted invention. (Finding of Fact No. 13.)

7. That the Court erred in holding that the ring construction of the patent in suit was not the result of mere mechanical skill, and that it was the result of the inventive faculty. (Finding of Fact No. 14.)

8. That the Court erred in holding that the patentee was the first in the art to provide a commercially practical ring ensemble or set of a wedding ring and engagement ring capable of being latched together to prevent relative rotation and axial movement when worn upon the finger. (Finding of Fact No. 15.)

9. That the Court erred in holding that the use of the widely used dove-tail tongue and groove or mortise and tenon type of connection in latching two finger rings together in the manner shown in the patent in suit [49] amounted to more than mechanical skill and was the result of invention. (Finding of Fact No. 16.)

10. That the Court erred in holding that the most pertinent prior art on the subject of the patent in suit was that which was before the Patent Office during the prosecution of the application which resulted in the patent in suit, namely the Harris patent No. 2,000,228. (Finding of Fact No. 17.)

11. That the Court erred in holding that the subject matter of the patent in suit was not anti-

icipated by the prior art in evidence herein. (Finding of Fact No. 18.)

12. That the Court erred in holding that the defendant-cross-plaintiff's so called commercially successful ring ensembles were substantially identical in construction and mode of operation with that shown in the patent in suit. (Finding of Fact No. 19.)

13. That the Court erred in holding that the accused ring ensembles infringe the claims of the patent in suit. (Finding of Fact No. 21.)

14. That the Court erred in holding that plaintiffs-cross-defendants infringed the patent in suit or any patent rights owned by defendant-cross-plaintiff. (Finding of Fact No. 22.)

15. That the Court erred in finding and concluding that the defendant-cross-plaintiff, Granat Bros., had been damaged to an amount equal to eight percent (8%) of the retail sales price of the alleged infringing rings manufactured and sold by plaintiffs-cross-defendants, and that said Granat Bros., was entitled to such damages. (Finding of Fact No. 23, and Conclusion of Law No. 6.)

16. That the Court erred in holding that plaintiffs-cross-defendants offered no evidence sufficient to overcome the presumption of validity of the patent in suit. (Conclusion of Law No. 3.)

17. That the Court erred in holding that the defendant-cross-plaintiff, Granat Bros., is entitled to an injunction against plaintiffs-cross-defendants; that it is entitled to a judgment; and that it is

entitled to attorneys fees. (Conclusions of Law Nos. 8, 9 and 10.) [50]

18. That the Court erred in dismissing plaintiffs'-cross-defendants' complaint.

19. That the Court erred in not granting a decree holding the claims of the patent in suit invalid and void.

20. That the Court erred in not holding that the claims of the patent in suit are anticipated and void.

21. That the Court erred in not holding that all of the claims of the patent in suit set forth an old and exhausted combination and are therefore invalid and void.

22. That the Court erred in not holding that plaintiffs-cross-defendants did not infringe the patent in suit.

23. That the Court erred in not dismissing the cross-complaint.

24. That the Court erred in not awarding costs and attorney fees to plaintiffs-cross-defendants.

RALPH D. GOMEZ and WILLIAM HENDERSON, doing business under the name and style of **GOMEZ MANUFACTURING COMPANY**.

By /s/ **J. E. TRABUCCO**,
Their Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 20, 1948. [51]

[Title of District Court and Cause.]

COUNTER-DESIGNATION OF DEFENDANTS-
CROSS-PLAINTIFF OF CONTENTS
OF RECORD ON APPEAL

Come now Defendants-Cross-Plaintiff, Granat Bros., and Joseph Granat, and pursuant to Rule 75 of the Federal Rules of Civil Procedure designate the following additional portions of the record proceedings and evidence to be contained in the record on appeal:

1. The following additional portions of the Reporter's transcript of the proceedings and testimony taken at the trial of this case on November 12, 1948, are herewith designated to be contained in the record on appeal:

Page 29, line 18 to page 34, line 23, incl.; page 58, line 21 to page 59, line 2, incl.; page 71, lines 11 to 15, incl.; page 74, line 16 to page 75, line 5, incl.; page 75, line 12 to page 91, line 25, incl.; page 97, lines 18 to 21, incl.

2. This Counter-Designation of Defendants-Cross-Plaintiff of Contents of Record on Appeal.

MELLIN and HANSCOM,

By /s/ JACK E. HURSH.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 27, 1948. [53]

[Title of District Court and Cause.]

ORDER

It Is Hereby Ordered that pursuant to Defendants-Cross-Plaintiff's Motion under Rule 75 of the Federal Rules of Civil [54] Procedure, the Clerk of this Court include in the record on appeal:

1. Reporter's transcript of deposition of Joseph Granat taken on behalf of plaintiff-cross-defendants commencing on page 2, line 5, of the transcript, omitting the following: page 5, lines 2 through 26; omitting all of pages 6, 7 and 8; omitting from page 9, lines 1 through 12 and also omitting from this same page, lines 22, and 23; and omitting the last unnumbered page; and delete from the record on appeal:

2. Reporter's transcript of deposition of Ralph D. Gomez, taken on behalf of defendant-cross-plaintiff commencing on page 3 at line 11, and omitting the following: page 4, lines 6 through 25; omitting from page 12, lines 2 through 26; omitting from page 13, lines 1 through 8; omitting from page 14, lines 16 through 26; omitting from page 15, lines 1 through 26; omitting all of pages 16 and 17; omitting from page 18, lines 1 through 23; omitting from page 21, lines 11 through 21; omitting from page 26, lines 18 through 26; omitting all of page 27; omitting from page 28, lines 1 and 2; omitting all of pages 29, 30 and 31.

Dated January 4, 1949.

/s/ LOUIS E. GOODMAN,

United States District Judge.

It Is Hereby Stipulated by and between the parties hereto through their respective counsel that the above Order may be entered pursuant to Defendants-Cross-Plaintiff's Motion under Rule 75 of the Federal Rules of Civil Procedure.

/s/ J. E. TRABUCCO,
MELLIN and HANSCOM,
By /s/ JACK E. HURSH.

[Endorsed]: Filed Jan. 4, 1949. [55]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

Complaint for Declaratory Judgment.

Answer of Defendants Granat Bros. and Joseph Granat, and Cross-Complaint of Granat Bros.

Answer to Cross-Complaint.

Stipulation.

Notice of Additional Prior Act.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Undertaking on Appeal and to Stay Execution.

Designation of Contents of Record on Appeal.

Statement of Points Relied Upon.

Counter-Designation of Defendants-Cross-Plaintiff of Contents of Record on Appeal.

Order.

Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5.

Defendants' Exhibits Nos. A, B, C, D, E, F, G, H and I.

Deposition of Joseph Granat.

Reporter's Transcript for November 12, 1948.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 20th day of January, A. D. 1949.

(Seal)

C. W. CALBREATH,
Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Friday, November 12, 1948, 11:00 o'clock a.m.

Appearances: For Plaintiff and Cross-Defendants: J. E. Trabucco, Esq. For Defendants and Cross-Plaintiff: Messrs. Mellin and Hanscom, represented by Oscar A. Mellin, Esq. and Jack E. Hursh, Esq. [1 *]

Opening Statement on Behalf of Plaintiff

Mr. Trabucco: This action was originally commenced by Gomez Manufacturing Company against the defendant Granat Bros., for declaratory relief under the Declaratory Judgments Act, No. 400, Judicial Code Section 274(d).

The defendant Granat Bros. is the owner of the Joseph Granat patent No. 2,059,228, relating to a locked ring ensemble, in which an engagement ring and a wedding ring are held in joint relationship by a certain kind of connecting means.

The plaintiffs are manufacturing and selling ring ensembles embodying the disclosures of the Granat patent in suit, and at least one of the plaintiff's customers has been threatened with suit for infringement.

The plaintiff commenced this suit for declaratory relief, alleging that its business was in danger of being irreparably damaged by threats of suit by the defendants, and requesting that this Honorable Court declare the patent in suit invalid and not infringed.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

The defendants then filed a cross-complaint alleging infringement of the patent in suit. A stipulation is on file setting forth that an actual controversy exists, and that the patent in suit, if found by the court to be valid, is infringed. There is but one issue involved in this litigation, namely, is the patent in suit valid? The plaintiff contends that the [2] patent in suit is invalid for two reasons: First, because the prior art anticipates the claims which define the patented invention, and, second, because the claims in the patent in suit are fatally defective in that they define an old and exhausted combination consisting of two finger rings held in locked relationship by a well-known and commonly used type of connection.

The court's attention will be directed to the file history of the patent in suit, which discloses the fact that substantially all the prior art relied upon by the plaintiff to prove anticipation was overlooked by the Examiner during the pendency of the application in the Patent Office. It is the contention of the plaintiff that had the Examiner these prior art patents before him while the application was pending, the patent in suit would not have been granted. It is further contended the patent in suit is no longer presumed to be valid, and that the prior art fully anticipates all of the patent claims.

The Court: Is the plaintiff a merchant?

Mr. Trabucco: The plaintiff is the manufacturer of jewelry.

The Court: The defendant owns the patent. This is one of those cases where before you could file

a suit for infringement, the other fellow filed a suit.

Mr. Trabucco: That is correct, your Honor.

The Court: So, in reality, the defendant here is the owner [3] of the patent and is claiming that the plaintiff infringed.

Mr. Trabucco: Yes.

The Court: So the plaintiff came in ahead of time to have the court declare he was not infringing?

Mr. Trabucco: That is right, your Honor. At this time I would like to offer in evidence a printed copy of the patent in suit, the Granat patent—

The Court: Mr. Trabucco, there is no question of infringement? The only question is the validity of the patent?

Mr. Trabucco: That is correct, your Honor—Granat patent 2,059,228, issued November 3, 1936. I ask that that be marked Plaintiff's Exhibit No. 1.

The Court: It may be admitted.

(The patent referred to was thereupon received in evidence and marked Plaintiff's Exhibit 1.)

The Court: You are appearing for the plaintiff?

Mr. Trabucco: That is correct, your Honor. In the ordinary procedure I would be representing the defendant, you see.

The Court: You are taking the laboring oar. You are assuming that the owner of the patent, by virtue of the presumption of validity, is offering the patent in evidence and you are going to proceed now to present evidence as to its invalidity?

Mr. Trabucco: That is correct, your Honor. I am holding that the patent is invalid. [4]

The Court: And you are offering the patent in evidence?

Mr. Trabucco: I have offered it in evidence, your Honor.

The Court: You are doing a job for your opponent, then.

Mr. Trabucco: Yes, I am taking the laboring oar here.

I now offer in evidence the file wrapper and contents of the Granat Patent No. 2,059,228, and ask that it be marked Plaintiff's Exhibit No. 2.

(The file wrapper and contents referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Trabucco: I next offer in evidence the deposition of Joseph Granat.

The Clerk: I believe that is on file, your Honor. May that be deemed in evidence?

Mr. Trabucco: I also introduce in evidence the stipulation of the parties, and I assume that the clerk would like to keep that in the file.

Mr. Mellin: If the Court please, with counsel's consent, may that be written by the reporter into the transcript, because it is really stipulations of

fact which we have agreed upon, so we do not have a separate exhibit.

The Court: Very well.

(The stipulation is as follows:)

“Stipulation

“It Is Hereby Stipulated by and between the parties hereto through their respective counsel as follows: [5]

“1. That the plaintiffs-cross-defendants are Ralph D. Gomez and William Henderson, co-partners doing business under the name and style of Gomez Manufacturing Company and having their place of business at San Francisco, California.

“2. That defendant-cross-complainant Granat Bros. is a corporation duly organized under the laws of the State of California, having its principal place of business at San Francisco, California, and defendant-cross-complainant Joseph Granat, an individual, is a resident of San Francisco, California.

“3. That an actual controversy exists between the plaintiffs-cross-defendants and defendants-cross-complainants hereto as to the validity of United States Letters Patent No. 2,059,228.

“4. That on November 3, 1936, United States Letters Patent No. 2,059,228 were issued by the United States Patent Office to Joseph Granat.

“5. That the entire right, title and interest in and to said United States Letters Patent No. 2,059,228 were assigned to defendant-cross-complainant Granat Bros. by Joseph Granat, and that the entire interest in and to said Letters Patent

was at the time of filing the complaint and now is owned by defendant-cross-complainant Granat Bros. [6]

“6. That the charge or charges of the complaint as to United States Letters Patent No. 2,016,492 are dismissed without prejudice.

“7. That if this Court finds that United States Letters Patent No. 2,059,228 is valid, plaintiffs-cross-defendants Ralph D. Gomez and William Henderson admit that the ring ensemble manufactured and sold by them infringes the claims of said United States Letters Patent No. 2,059,228, it being understood that plaintiffs-cross-defendants Ralph D. Gomez and William Henderson deny the validity of United States Letters Patent No. 2,059,228.

“8. That defendants-cross-complainants dismiss without prejudice the Second Cause of Action set forth in their Cross-Complaint on file herein.

“9. That uncertified printed copies of Letters Patent of the United States and that photostatic copies of printed publications shall be received in evidence, when offered in evidence by either party with the same force and effect as the certified copies of Letters Patent or original copies of publication, subject to correction by competent evidence as to any errors therein appearing.

“10. That Ralph D. Gomez and William Henderson as co-partners doing business under the name and style of Gomez Manufacturing Company, may be substituted as plaintiffs for the named plaintiff in the complaint on file [7] herein, and that all allegations of complaint may be deemed to

be made on behalf of said substituted plaintiffs and that the answer to the complaint on file herein be deemed a complete answer to all of the allegations of the complaint made on behalf of the substituted plaintiffs.

J. E. TRABUCCO,

Attorney for Plaintiffs-Cross-
Defendants.

MELLIN AND HANSCOM,

By JACK E. HURSH,

Attorneys for Defendants-
Cross-Complainants.

San Francisco, California.

Dated: September 14, 1948.

So ordered

LOUIS E. GOODMAN,

District Judge."

Mr. Trabucco: I next introduce in evidence the book of exhibits containing the following prior art:

Mr. Mellin: If your Honor please, before that offer is made I am going to object to it as being improper at this time, because there is no foundation laid. There is no showing that all of these exhibits are pursuant to the issue of validity here. Some of them, for example, while this matter concerns finger rings, some of the exhibits offered pertain to building construction, large mechanical construction, and some of them are not in time. I think some witness ought to be put on to testify to them so they could be objected to individually. [8] Some of them, of course, are proper.

The Court: How many prior art patents are you relying upon?

Mr. Trabucco: There are 13 prior art patents, but two of them are not relied on as anticipating the patent in suit.

The Court: In this type of case that is an awful lot of prior art.

Mr. Trabucco: Yes, but there is a group of patents, your Honor, which show a certain type of connection which is commonly used in various trades and in various prior art. There is a line of decisions which hold that where a certain device that is commonly used throughout various industries and various arts, that the selecting of that type of appliance and using it in some new art is not inventive. I have decisions on this point that are quite clear. For that reason these patents are pertinent here.

Mr. Mellin: I still think, your Honor, we ought to take them one at a time so we can get in an objection, not only to their relevancy, but their pertinency and competency as to dates.

The Court: Why don't you have them marked for identification at this point? Did you have in mind offering some testimony with respect to these?

Mr. Trabucco: Yes, I did, but irrespective of the testimony I believe they are proper evidence in this case. They [9] are prior art patents. We have a stipulation printed copies——

Mr. Mellin: I have no objection, your Honor, to the fact that they are photostats or plain copies. That we have no objection to. But we do have an objection as to the materiality of the subject matter of these patents.

The Court: Mark them for identification and I will rule on the objection later.

Mr. Trabucco: They are bound together and they are arranged in two groups. There is one group marked "Ring Ensembles," and the other group is designated——

Mr. Mellin: May I have counsel read them so I can check them off in my book, your Honor?

Mr. Trabucco: Yes. The other group is dove-tail tongue-and-groove connections. The patents included in the first group are the Kaas patent, 424,211; next the Bullard patent, 464,749; Thomas patent, 1,536,540; Beaujard patent, 1,712,417; Harris patent, 2,000,228; Gross patent No. 2,077,234.

Then in the other group of patents there is the Kelly patent, 152,233; Linderman, 517,348; Atkinson patent, 942,047; Tschirgi patent 1,482,772; Hubbard patent, 1,715,293; Mittleburg patent 1,829,366; Birnbaum patent 1,877,750.

The Court: Mark it plaintiff's Exhibit 3 for Identification.

(The book of patents referred to was thereupon marked Plaintiff's Exhibit 3 for Identification.) [10]

Mr. Trabucco: Mr. Vale, will you take the stand?

Mr. Mellin: If your Honor please, I wonder if I may have a chance to make my opening at this time, if he is going to call his witness?

The Court: Very well.

Opening Statement on Behalf of Defendants

Mr. Mellin: If the Court please, in order that the court may fully understand what is going to

happen and what the testimony of the defendant is, I might start out by saying, very briefly, that a notice of infringement was sent to this plaintiff on this patent, and a short time after that notice was given the alleged infringer responded to counsel, asking for time to look into the matter to determine whether or not there was in fact infringement in their opinion. And then there was a short interchange between counsel after that opinion apparently had been formed, and then within a relatively short time, a matter of a few weeks, this action was filed the day before the patent owner was to file his action. So there isn't any long harassment of customers. In fact, the only evidence that we can find that can be introduced of harassment was the notification of one jeweler in Oakland who had this ring, whose identity could not be determined from the ring, itself. That is how it happened that a customer was notified.

The patentee's evidence will show that sometime in 1929, and before that time, wedding rings, that is, diamond wedding [11] rings we are speaking of, were made with the diamonds completely around the circle of the ring, and the reason for that was if the rings on the finger were slightly loose, they would turn on the finger in ordinary practice, and the stones were all around the ring, so there would always be a nice presentation of the wedding ring alongside of the engagement ring, making the set.

Sometime in the neighborhood of 1929, when the crash came, there was a demand for a much less expensive wedding ring, which was partly fulfilled

by making the stones only partly around the circle, which were supposed to be presented alongside of the engagement ring to the front, and the rest of the ring was devoid of stones. That consequently was of much less expensive structure.

Some of these rings went into merchandising, but not to any real great extent, because the trade found in some instances they were not entirely satisfactory because the wedding ring, the stone part of it, would turn on the finger and sometimes it would be presented and register with the mounting or setting of the engagement ring matching it, otherwise there would be only part of the gold band exposed, and it did not present a real neat appearance.

The jewelry trade, as we will show in the evidence, tried to remedy that by finding some inexpensive method of keeping the two rings, one from turning relatively to the other, and [12] they did it by making a sidewise indentation in the wedding ring which would fit a projection, let us say, on the engagement ring, and that was supposed to keep them from relatively turning.

The Court: The purpose of that being so the stones would always be exposed on both rings?

Mr. Mellin: Yes, your Honor. It would be so that they could make it—if I may hand this up to your Honor for just a moment—make it so the stone setting of the wedding ring would be in register and match with the stone setting of the engagement ring. By the way, the rings I have handed your Honor are not rings in suit, but the ones I

am speaking of. If the rings are really tight on the finger, that would partially overcome this prior disadvantage and it would answer this demand by the jewelry trade for something that would overcome that slipness in the registration of rings. But this did not answer the problem, either, because if the rings were slightly loose on the finger, they would separate axially and that projection would not do any good, and the rings would have this prior disadvantage that the first ones had. We will show that there was a real demand in the trade for something that would respond to it, and we will show that this patentee, Joseph Granat, was the one who realized that something had to be done to respond to that demand and do something about it. In other words, he produced the ring which is the subject of the patent in suit, which could be so [13] latched together that the rings not only would not turn axially with respect to them, but they would not move this way so they could get apart. We will show that that ring was introduced in the trade in about 1934 and precisely, as shown in the patent, from 1934 to the present date literally thousands and thousands of them have been sold by this patentee, that is, those holding under the patentee, which is the nominal defendant here. We will show that the trade immediately accepted it as being something the trade had wanted for years, this type of ring, and it met with immediate and tremendous success.

We will show that despite his denial of the fact that this defendant or rather plaintiff Ralph M.

Gomez was a diamond setter here in San Francisco, and prior to 1940, or sometime during that period, over a period of years, he was employed as a sort of separate agent by the patentee, or those holding under the patentee, to set ensembles such as these with stones, and hundreds of rings a week would be turned over to him to have the stones set in these mountings which were supplied to him by the defendant, or someone holding under them, Mr. Gomez's testimony, as we will show, denies that he ever saw a ring of this construction prior to January, 1948; whereas we will show that in the City of San Francisco alone there were half page ads for the Granat retail store, half page ads advertising these rings regularly over a period of years from [14] 1934 to 1941 and up.

We will show, as your Honor gathered from the stipulation, that there is no contention here that the ring of the defendant is not precisely like the patent, or the ring of the alleged infringer is not precisely that of the patent or is not precisely the commercial product of the patent owner, or those holding under him. So we say that the evidence, given its full weight and value, will show that here was a question of deliberate copying from a man who had access to the patentee's products, could see the rings, who now denies that he ever saw one before 1948 when he produced the ring which is in question, but we will show that all during the period, despite the fact that hundreds of these rings were produced by the patentee over the period 1934 up, rings that sold in platinum up to \$650 a set, we

will show that no one all during those years ever contested this patent or produced a device up until with the last year and a half or two years, when the demand in the trade was so great for two rings that would latch together to accomplish these results that all the jewelry trade acquiesced in the patent by not producing the ring or contesting the patent. We will show that acquiescence to show that there must have been an invention involved, or the trade would have moved in on this particular business sooner. We will show by that acquiescence that there was an intention, and we will show that although these rings were sold nationwide [15] in practically every city in the United States from 1934 on, they were left in undisturbed possession until the demand got so great in the jewelry trade, competitors had to produce some kind of locking ring, whether it was efficient or not, in order to compete. We will show by those very things that what the defendant bases his defense upon here is that although there was a big demand in the trade for such a ring, and that there wasn't any fulfillment of that until this patentee fulfilled it, and which was immediately accepted by the public, now they say in hindsight that the invention was made in 1900, 1909, 1910, all the way through of different types of rings, none of which were ever commercialized, as the evidence will show, but they do not follow those prior patents. They give those the tribute of invention, but here, as the evidence will show, they made an exact Chinese copy not only of the patented structure, but also the commercial

structure which the defendant makes under its patent. The only issue is validity. That is the question. Whether this was invention or not is actually the issue under the pleadings. One of the pleadings, for example, in the complaint is that Joseph Granat, the inventor named in the patent, makes these defenses:

“Plaintiff avers that the aforesaid patent——” and, by the way, your Honor, there were two patents in suit originally, one of which was withdrawn by the consent of both [16] parties. One of them was a patent on this indentation idea, which we withdrew——

“——and each of them is invalid and void for the reason that the patentee, Joseph Granat, was not the original first and sole inventor or discoverer of the combination engagement and wedding ring ensembles, or any material or substantial parts thereof, but that said inventions disclosed and claimed in the aforementioned patents and all of the material and substantial parts thereof had been disclosed to the public by others, invented by another or others than Joseph Granat prior to the dates of the alleged inventions of Joseph Granat and/or more than two years prior to the filing dates of the applications which resulted in the aforesaid patent, as appearing in divers printed publications and patents of the United States, to-wit:——”

those being the patents.

Then the second charge of non-validity or invalidity is based on the fact that the plaintiff on infor-

mation and belief avers that "said alleged inventions purported to be covered by the said Letters Patent," giving the numbers, "and particularly set forth in the claims thereof is devoid of substantial novelty in view of the well known state of the prior art, and that it does not constitute patentable subject-matter or invention or discovery within [17] the meaning of the patent laws of the United States, and did not involve or require the exercise of the inventive faculty for its production, for which reason said letters patent are null, void and of no effect."

Then he says, "The plaintiff, on information and belief, avers the fact to be that letters patent No. 2,059,228 and each of the claims thereof are invalid and void for the following reasons:

"(a) Because in the prosecution of the application for said letters patent, and particularly by the limitations and the restrictions made therein under the requirement by the Commissioner of Patents during the proceedings in the Patent Office while said application was pending therein, the claims of said letters patent were so limited by the acts of said Joseph Granat and his attorney that the alleged novelty of the claims of said letters patent does not constitute patentable novelty within the meaning of the patent laws of the United States, and that plaintiff is estopped from denying that the alleged novelty constituted merely certain features already known in the art.

"(b) That the claims of the said letters patent are defective and void, in that each of them defines

an old and exhausted combination, to-wit, an engagement ring and a wedding ring together with coupling means for holding the said rings in interlocked relationship; and that the [18] said claims of said letters patent and each of them are invalid and void for the reason that they do not set forth a patentable combination or structure."

I close with this, your Honor: There is only one issue for your Honor to decide, as I see it from the stipulation and the pleadings, and that is whether the invention patentable under the law was involved by the structures which we will produce, and which is shown in the patent, over the prior art, in view of the prior art they have produced, and we will contend that the evidence is insufficient to overcome the presumption of novelty which attaches to the grant of the patent, because it is our contention that the Patent Office had approved it and cited at least one patent which is as close to our structure as any of the prior art cited here.

The Court: We will take a brief recess before we proceed.

(Recess.)

BALDWIN VALE,

called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Q. (By the Clerk): Will you state your name for the record? A. Baldwin Vale.

Direct Examination

Q. (By Mr. Trabucco): What is your occupation, Mr. Vale? A. Patent attorney.

(Testimony of Baldwin Vale.)

Q. Have you ever acted as an expert in patent infringement suits? [19] A. Many times.

Q. Will you state your qualification as an expert?

A. Well, I have been a patent attorney, drafting patent application for the Patent Office, including specifications, drawings and claims, and I am an inventor and have designed and manufactured everything from jewelry to agricultural implements. I have been superintendent of a harvester works, and I am familiar with practically every phase of invention, except chemistry.

Q. How long have you been a patent attorney?

A. 50 years.

Q. Do you recall how many cases you acted as expert in?

A. I haven't kept any record of it, but I recalled this morning a half dozen, perhaps, but I am sure that is not any considerable proportion of them.

Q. Have you examined the patent in suit, the Granat patent 2,059,228? A. I have.

Q. Have you studied the claims of this patent?

A. I have.

Q. Are you familiar with the prior art comprising the various patents contained in Plaintiff's Exhibit for Identification No. 3, which are relied upon by the plaintiffs as anticipations of the claims of the patent in suit? A. Yes, I have. [20]

Q. Will you state briefly what each of these prior art patents discloses?

The Court: Counsel, I have adopted a rule in patent cases to the effect that I see no necessity

(Testimony of Baldwin Vale.)

for any expert reading patents and explaining their meaning to the court. I say that in no way in criticism of the functions of a so-called expert, but I can read the patent, and the attorneys are familiar with the matter, and you can point out anything in that patent that you wish. I find it takes up an unnecessary amount of time having some patent attorney or expert tell the court what the meaning is of the language of a patent. I know that is somewhat revolutionary in patent procedure, but I believe the Federal Rules of Civil Procedure apply in patent cases, as they do in other cases, and one of the essentials is simplicity, the accomplishment of simplicity in procedure, and I see no necessity for another attorney taking the witness stand and making an argument as to the meaning of a patent. You can do that. You are familiar with it, and I will hear anything you have to say by way of argument, or in a brief, but I see no occasion for long explanations of so-called patent attorneys or experts with respect to patents. If you wish to have expert testimony to point out what you consider to be the similarities or fundamental similarities with respect to the prior art patents, that is all right. I have no objection to that. We just finished a case yesterday that was going to [21] take a week or ten days to try, and we tried it in, I would say, a day and a quarter by eliminating that, and the attorneys were told when they got through that they could explain those matters to the court argumentatively, or in briefs, as well as an expert could. It may appear

(Testimony of Baldwin Vale.)

to you experienced patent attorneys that the judge is being guilty of some affrontery in saying he does not want to hear these matters, but I think if you give considertaion to it you will find as lawyers who present these matters you are just as able to explain these matters argumentatively as the witness is. There is no need to put it in evidence. It will be before the court by way of argument and explanation on behalf of the attorneys, and there is no reason to make a long record of the argumentative features of the matter.

So I think with that explanation, if you will confine the testimony of the witness to such matters as need expert testimony by way of comparsion and the like, we will save considerable time, and then you may present the other phases of the matter that are argumentative in character in your briefs, or orally, as you see fit.

Mr. Trabucco: If I am too detailed in this matter I would be glad to have the court point out to me where I am overstepping my bounds, in view of the court's remarks.

The Court: I am not intending to be didactic about it. I just point that out, and you can proceed in accordance with that suggestion, [22] I think. You understand what I have in mind, and you can shorten the matter. It is not the function of the court to cut either side off in presenting any phase of the matter, except I feel the argumentative phase of the matter can just as well be presented by the lawyers as it can by witnesses.

(Testimony of Baldwin Vale.)

Q. (By Mr. Trabucco): In the prior art do you find two finger rings held in locked relationship? A. Yes, several times.

Q. Which patents are those the group of patents?

A. The patent to Kaas, is one. The patent to Bullard, two rings joined together.

Q. (By the Court): You say there are two rings joined together in the Kaas patent?

A. Yes. They are interlocked with an undercut notch in the joint. In Bullard we have a ring with an undercut recess, which is the bottom portion of the diamond setting. The Beaujard ring has a lug with a point or tenon that cuts up into that opening. So that comes under the heading of mortice and tenon, a socket and lug.

They have in Thomas a variation. It is more in the nature of a key lock, in which they form a socket in a definite shape and then form a lug to fit that shape, and the two rings are together at the axial alignment. They are held in alignment, and that locks them together and holds them together while they are on the finger. That the socket and lug principle again. [23] It goes by many names of mortice and tenon, keying, dove-tail joint, and has infinite varieties and is varied slightly with the particular line of business in which it is applied.

In Birnbaum we have a socket with a lug that fits that configuration of socket 21; the lug 20 fits that configuration and prevents relative movement between the parts. The same is true in the Harris

(Testimony of Baldwin Vale.)

patent. It has a lug and socket, one of the sockets being undercut.

The Court: Which one are you referring to now?

A. Harris. There is a side recess with a lug that fits into it, and as an alternative it has an undercut recess into which the lug can fit.

Q. (By Mr. Trabucco): In each of these patents that you have mentioned, particularly the first three, the Kaas, Bullard and Thomas patents, are those two rings of the ensemble shown as being held in locked relationship? A. They are.

Q. Does one ring rotate with respect to the other?

A. Only off the finger, yes. In joining them together they do in Thomas.

Q. Does the locking means shown in each of these patents prevent the two rings from rotating relative with respect to each other?

A. The locking means does prevent that rotation. It also prevents lateral separation. [24]

Q. In the patent in suit what type of locking means is provided?

A. A tongue-and-groove, or lug and recess, or tenon and mortice. He uses both terms in that patent in which a peg fits, a peg fits a hole, and in this instance the hole is a rectangular recess and the lug is of the same configuration, and they slip together just as the tongue-and-groove does.

Q. In the prior art do you find any similar type of connection between any two relatively movable members?

(Testimony of Baldwin Vale.)

A. Yes, that is common, particularly in carpentry, and in this prior art that you have in Exhibit 3, we find that in Birnbaum, that I have already described, Fig. 5 especially. In the patent to Kelly, which is very old, 1874, we have a tongue-and-groove connection between the staves of a barrel or a tub, so the tongue-and-groove idea is old. In almost any prior art where two things are going together, that is found. The same goes for Linderman. That is a tongue-and-groove connection, only it is a double tongue-and-groove, depending on the thickness of the parts.

In Atkinson, we have two rings. In this case it is a pipe coupling, but they are rings nevertheless, held in relation to each other by means of lug and recess, and also part of the joint has an overhanging lug that prevents them separating across the axis in one direction, which is common to the rings also.

The same thing goes for Grierson. That is also a pipe connection, [25] rather more complicated, but it involves the same tongue-and-groove and dovetail arrangement with a stop to align the axes of the parts.

In Tschirgi we have two cylindrical members joined together by the lug and socket dovetail joints, which is also called mortice and tenon. Each trade seems to prefer some different name.

In the Hubbard patent we have pretty much the same condition of a shaft joint that is rather more complicated, joined by tongue-and-groove, and dovetail in the joint. That is shown particularly Figures 4 and 5, a rather complicated arrangement, but

(Testimony of Baldwin Vale.)

for the same reason, prevention of axial disalignment and longitudinal separation of the coupling.

The patent to Mittleburg shows the same lug and recess arrangement, rather on a longitudinal or longer basis, but the same principle is involved regardless of size and length.

Those are characteristics. Nearly every piece of furniture is put together by that joint. This chair I am sitting in has several mortice and tenon joints.

Q. In each of the claims are the two rings of the ensemble included as elements of the combination? A. Yes, they are.

Q. What other elements, if any, are there in each claim?

Mr. Mellin: If your Honor please, I object to that type of testimony. It is for this court to determine the claims [26] as a matter of law, not for the witness to testify what he claims or his interpretation of the claims. That is purely a matter of law for the Court, and it is unheard of to have a witness to tell the court what the meaning of claims in the patent is, any more than for a witness to tell the court what the meaning of a contract is. That is a matter that speaks for itself. It is a matter for the court.

The Court: Read the question.

(Question read.)

The Court: I think that objection is good, Counsel. You can make your argument on it.

Mr. Trabucco: Yes, your Honor.

(Testimony of Baldwin Vale.)

Q. This prior art that is contained in the book of Exhibits marked Plaintiff's Exhibit 3 For Identification, will you consider all of that pertinent prior art in this matter?

Mr. Mellin: Your Honor, if you limit that question to those which have just been discussed I have no objection, but in that book is a patent to Grove which is in controversy with the patent in suit, and it is not in time, and I would have to insist that that patent to Grove, which is the last in the book, be eliminated from that question.

Mr. Trabucco: That is satisfactory.

The Court: In the book I have it is not the last one. Are you referring to the E. J. Grove patent?

Mr. Mellin: That is right. [27]

The Court: You say that is not in interference?

Mr. Mellin: That is not in time.

Mr. Trabucco: That is satisfactory, your Honor. I will limit my question to the other patents that are contained in the book of exhibits.

Q. Do you understand the question, Mr. Vale?

A. No, I would like to have it read.

(Question reread.)

A. Yes, I do.

Q. (By Mr. Trabucco): I will show you a catalog, the title of which is, "Jewelers' Circular-Key-stone," dated September, 1948, and ask you if you can point out a number of different types of ring ensembles which are held together in locked relationship illustrated in this catalog?

(Testimony of Baldwin Vale.)

Mr. Mellin: If your Honor please, I object to that question on the ground it is entirely immaterial. Here is a catalog of 1948 and this patent issued in 1936.

Mr. Trabucco: The purpose of the question is not to show anticipation of the invention, but merely to show that there are a large number of ring ensembles now in the market which embody locking means interposed between two rings to hold them in joint relationship.

Mr. Mellin: Your Honor, I do not see how that is material on the question of invention twelve years prior. I mean how does it help the plaintiff, here, if there are other infringers, [28] or there are followers after the fact? I do not see how it is material to the issue.

Mr. Trabucco: The contention is made here, your Honor, that commercial success validates the patent or is a presumption in favor of validity.

The Court: Counsel could not make that point because that is not the law.

Mr. Trabucco: It is a presumption in favor—

The Court: No, I think our circuit has held that commercial success is never a substitute for proof of novelty, but it may have evidentiary value on the question.

Mr. Mellin: That is right, your Honor. When the issue of commercial success is made, if a 1948 catalog rebuts it, that is another thing, but now they are trying to offer it after the fact.

Mr. Trabucco: I will hold it until after the defendant's case is in. That is all.

(Testimony of Baldwin Vale.)

Cross-Examination

Q. (By Mr. Mellin): Mr. Vale, what experience have you had in making or associated with the making of finger rings, particularly diamond engagement and wedding rings, if any?

A. Well, I designed my wife's engagement ring. I have designed diamond-studded jewelry, but I have not been in this ensemble part.

Q. Have you been in the general manufacture of rings of any kind? [29]

A. My clients have been.

Q. What experience has that given you, personally?

A. Just by looking and seeing and examining and suggesting.

Q. What clients were those, Mr. Vale?

A. I beg your pardon?

Q. What are the names of those clients?

A. The only one I have had recently has passed away, Mr. Tucker. I have not had any since. That is many years ago.

Q. As a matter of fact, in these cases that you experted as a patent expert, one of them was an accounting system of cards, card edges, isn't that right? A. That is right.

Q. None of these other cases had anything to do with jewelry, did they? A. No.

Q. So the knowledge you have gained of rings you gained solely from the record to which you testified here and in talking to one or more of the plaintiff's attorneys?

(Testimony of Baldwin Vale.)

A. On the contrary, I told you I designed my wife's engagement ring.

Q. Did it have a locking means?

A. No, it did not, but it was prepared for a locking means because the diamond was offset from the band.

Q. As a matter of fact, you know, Mr. Vale, from your long mechanical experience, that every mechanical element in itself has [30] in one form or another since almost time immemorial?

A. That is true, there is nothing new under the sun, except combinations.

Q. So when you take any mechanical machine, each of its parts, if you took them up by themselves, is out in the open? A. That is right.

Q. In the patents you testified to, the patent to Kelly, in Exhibit 3, is a large wooden tub, isn't it?

A. That is right, if I remember correctly.

Q. The patent to Linderman, that is some form of making large wooden boxes, isn't that so?

A. Well, it shows a dove-tail mortice joint.

Q. I understand that. I am just asking if that is a way of connecting boards.

A. That is a way of connecting flat boards together to form a table top, or whatever is done.

Q. The patent to Atkinson is a relatively large coupling—that is, relatively large with respect to a wedding ring—for connecting large holes or pipes together, is that correct? Just answer the question.

A. Size does not enter in there.

Q. I am not asking you to argue, Mr. Vale: I

(Testimony of Baldwin Vale.)

am asking you if it is a fact that it is a relatively large coupling to couple pipes together?

A. I have seen pipes smaller than rings. [31]

Q. Would you answer the question now?

A. That is for connecting pipes together, yes.

Q. The patent to Grierson is likewise a pipe connection, is that not so?

A. Yes, that is a pipe coupling.

Q. It does not tell you in there that this form of connection can be made for connecting a wedding ring to an engagement ring, does it? It tells you in there? If so, please tell me where it is.

A. Connecting a wedding ring, no. You do not have to do that. The patent would be a mile long if you wrote in all the things it could be used for.

Q. The patent to Tschirgi, 1,482,772, that is for connecting concrete pipe joints, isn't it?

A. That is right.

Q. And concrete pipe is made in the smallest diameter 6 inches up to about 8 feet in diameter, isn't that so? A. That is correct.

Q. Mr. Vale, taking all of the patents which you have before you and which you testified to, have you ever seen a commercial wedding ring and engagement ring that is put out commercially made such as illustrated in those patents, in those construction? A. Personally I have not, no.

Q. You have never seen one, have you?

A. No. [32]

Q. So, as far as you are concerned, you would not know whether any were made, or not?

A. No, it would not alter the fact.

(Testimony of Baldwin Vale.)

Q. As a matter of fact, you are not a skilled jeweler, are you, in the way of manufacturing jewelry?

A. I would not claim to get into the very fine stuff. I have made some crude stuff.

Q. As a matter of fact, you would not know from any wide experience in making jewelry whether or not it would be practical from the commercial viewpoint, taking into consideration the manufacturing of it, the wear to which these rings were subjected over the years, and similar factors, whether or not it would be practical to make rings according to these patents to which you testified?

A. Well, I think so.

Q. But that is based solely upon your opinion?

A. Yes. I have never made any.

Q. So of all the patents you have referred to in the prior art, at least the patents to Kelly—let me check over these with you; you may check with your book—Birnbaum, Linderman, Middleburg, Tschirgi, Atkinson, Grierson and Hubbard do not refer specifically to wedding rings or finger rings in any fashion do they?

The Court: That is self evident, isn't it?

Mr. Mellin: May I have the one answer, your Honor? I think [33] the answer is simple.

The Witness: The only one I am in doubt about is Hubbard.

Q. (By Mr. Mellin): Hubbard, as I recall it, is an electric light fixture. That is a shaft coupling. I beg your pardon.

(Testimony of Baldwin Vale.)

A. May I have the question, please?

(Question read.)

A. No.

Q. (By Mr. Mellin): So that leaves, of the prior art to which you have referred, the patents to Kaas, Thomas and Harris as the ones that disclose finger rings, isn't that correct?

A. Kaas, Bullard is a finger ring—

Q. I beg your pardon, Kaas, Bullard, Thomas and Harris. A. That is right.

Q. Now, none of those show the precise construction of the wedding ring connection as shown in the patent in suit, isn't that correct?

A. Not precisely, they do not.

Q. In other words, what they are intended to do in the prior art, as you testified, was an attempt to accomplish a somewhat similar purpose to prevent them from relatively rotating and separating?

A. That is the purpose, yes.

Mr. Mellin: That is all.

Mr. Trabucco: At this time I would like to have this exhibit marked Plaintiff's Exhibit 3, your Honor. [34]

The Court: Do you wish to ask any more questions?

Mr. Trabucco: No, the plaintiff rests.

(Testimony of Baldwin Vale.)

Mr. Mellin: I have no objection to that exhibit, your Honor, assuming that the Gross patent is removed from it.

The Court: Very well.

(Plaintiff's Exhibit 3 For Identification was thereupon received in evidence.)

The Court: I think before you proceed with your case we will recess until two o'clock.

(A recess was thereupon taken until two o'clock p.m.) [35]

Afternoon Session, November 12, 1948, 2:00 p. m.

Mr. Mellin: May I file at this time the deposition of Mr. Ralph D. Gomez?

JOSEPH NORMAN WINEROTH,

was called as a witness on behalf of plaintiff, and being first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Mellin): Will you give your full name, your age, and [37] residence?

A. Joseph Norman Wineroth, 53, 2121 Broadway.

Q. San Francisco? A. San Francisco.

Q. What is your occupation?

A. President of the L. A. Giacobbi & Company and the Granat Manufacturing Company.

Q. Where are those companies located?

(Testimony of Joseph Norman Wineroth.)

A. We are 114 Geary Street, on the Sixth Floor.

Q. San Francisco?

A. San Francisco, California.

Q. With respect to the L. A. Giacobbi Company, by whom is the stock in that company owned, and in what proportion?

A. I own a third of it, and Mr. Leo and Mr. Joseph Granat each own a third.

Q. And with respect to the Granat Manufacturing Company?

A. The same applies to that.

Q. What is the business of the L. A. Giacobbi & Co.?

A. We import diamonds and we take the entire output of the Granat factory and put the two together, and distribute them nationally through our sales force.

Q. When you say the entire output of the Granat factory, what kind of jewelry do you have reference to?

A. I want to correct something. I say the entire output. We take practically the entire output. A certain amount we [38] use for the retail stores and the other is sold through our company, which is nationally distributed.

Q. When you talk about your retail stores, you speak about the stores of the plaintiff?

A. Just the three retail stores of Granat Bros.

Q. What merchandise is principally concerned there?

A. We manufacture engagement and wedding rings.

(Testimony of Joseph Norman Wineroth.)

Q. Is that known, to some extent, as wedding ring and engagement ring ensembles?

A. That is correct.

Q. How long have you been in the business of merchandising, including your connection with the L. A. Giacobbi & Co. and the Granat Manufacturing Company, diamond wedding and engagement rings?

A. About 30 years.

Q. Did you have anything to do with traveling with respect to merchandising these rings?

A. I traveled extensively for 20 years, 22 or 23 years.

Q. Commencing when?

A. Well, in 1915.

Q. And ending some 22 years later?

A. Well, yes. I stopped traveling extensively about six or seven years ago.

Q. What parts of the country did those travels take you into regularly? [39]

A. The entire United States; that is, most of the principal cities.

Q. What were your duties? What did you do upon arriving at those various cities?

A. I was in charge of sales. That was my part of the activity in the firm. I took over the selling of all the merchandise through our own sales force, and then we had what we call distributors. In Kansas City we had a distributor, in Pittsburgh—in fact, we had one here in San Francisco, too. We had one in Seattle. We had one in Honolulu. Now, we ourselves sold directly to the dealers in the

(Testimony of Joseph Norman Wineroth.)

principal cities, and then these distributors, as we called them, they had a sales force of their own and we would sell them this merchandise and they in turn would sell it in the smaller towns which we could not reach with our own sales force.

Q. During those appearances and those travels over that period of time will you state whether or not you became familiar with what other products, competing products, that is, what diamond wedding and engagement rings were sold by competitors in those various places?

A. I did not get that question.

(Question read.)

A. Oh, yes.

Q. How would you do that, just very briefly?

A. Naturally in business it is not only my own job and my own [40] salesmen's jobs to know what the other fellow is doing, but we take the salesmen that work for these jobbers—I mean that was part of my job. When I would get to those towns we would have a sales meeting. They would tell me their troubles and tell me of their competition. Frankly, I think I was well aware of what our competitors were doing. That was part of my job to know.

Q. During that period of time, say prior to 1934, will you state whether or not you had ever observed the commercial sale or offering for sale of a diamond wedding ring and a diamond engagement ring which could be mechanically latched together?

A. You ask if I had ever seen one?

(Testimony of Joseph Norman Wineroth.)

Q. Prior to 1934. A. No, definitely not.

Q. Did you subsequently see one?

A. Well, I saw the one that we manufactured.

Q. When was that, please?

A. Sometime between 1933 and 1944.

Q. That, as I understand your testimony, was the first time you had seen commercially a diamond wedding ring and a diamond engagement ring which could be mechanically latched together commercially? A. That is correct.

Q. Prior to that time will you state briefly—a period of, say, five or six years prior to that time—the development [41] of the use of diamond wedding rings?

Mr. Trabucco: I see no reason for this testimony, your Honor. It has no bearing on the issues of this case. It is immaterial, incompetent, and irrelevant.

The Court: What is the purpose of this testimony?

Mr. Mellin: The point is we want to show there was a demand in the industry for them, and this supplied the demand, which under the authorities of this circuit, show there must have been invention. It goes to the point of invention solely.

The Court: You asked about diamond wedding rings.

Mr. Mellin: Diamond wedding and engagement rings.

The Court: You did not say that.

Mr. Mellin: I beg your pardon. I intended to.

(Testimony of Joseph Norman Wineroth.)

The Witness: I would like the question repeated.

(Question read.)

Q. (By Mr. Mellin): What type of rings were sold prior to that time?

A. We sold what were called a matching ensemble set. There was no locking feature. There was just an ensemble set.

Q. Will you state whether or not there were any disadvantages called to your attention with respect to that type of set?

A. The disadvantage to any ensemble set that does not have this locking feature is they would rotate; in other words, they would not be in alignment. A wedding ring may go one way and the engagement ring the other way, and naturally it does not lend [42] itself to as smart an appearance as one that was clasped together.

Q. Will you state whether or not to your knowledge there was a demand in the trade, say from 1929 to 1933, for a ring set that would latch together?

A. I can't answer that—a demand. If one were shown there is no doubt that there would have been a big demand.

Q. What was done, if anything, and if you know, at that time and prior to this mechanical latching that you speak of, by Granat Bros. in an attempt to keep the two rings from relatively rotating?

A. We brought out a ring that had a sort of notch in it. The wedding ring would fit into the

(Testimony of Joseph Norman Wineroth.)

mounting. That was done for the purpose of eliminating that rotating that I spoke about a moment ago.

Mr. Mellin: May I have this marked for identification Defendant's Exhibit A?

(A wedding ring and engagement ring ensemble were marked Defendant's Exhibit A For Identification.)

Q. (By Mr. Mellin): I hand you a wedding ring and engagement ring ensemble which is marked Defendant's Exhibit A For Identification, and call your attention to its construction, and ask you if that is what you meant by these attempts prior to 1934 to prevent the two rings from relatively rotating?

A. This is the ring we made for that purpose, to prevent [43] that turning or twisting.

Q. These rings you are referring to, the ones I am handing you? May I offer those in evidence, your Honor, as Defendant's Exhibit A?

The Court: Very well.

(Defendant's Exhibit A For Identification was thereupon received in evidence.)

Q. (By Mr. Mellin): Did those rings, such as Defendants' Exhibit A, overcome this problem of the two rings becoming out of register on the finger?

A. Frankly, this improvement that we made over the regular ring was not the improvement that we had hoped for. It did not do the job. It

(Testimony of Joseph Norman Wineroth.)

only did a very small part of the job. They still got out of alignment because there was nothing to hold them, and particularly if the ring happened to fit very snugly, it would do a fair job; but the average ring would not do a good job because it would slip just the same. There was nothing there to help it.

Q. You are referring now to Defendants' Exhibit A, which I just handed to you?

A. These sets, yes.

Q. Those sets, and as I understand your testimony, they were manufactured and put out by at least Granat Bros. sometime between 1929 and 1934?

A. That is right. [44]

Q. Speaking of the latching type rings, you saw in 1934, which you say were manufactured by Granat Bros., I hand you a diamond wedding ring and engagement ring ensemble.

May I have this marked Defendants' Exhibit B For Identification?

(The ensemble referred to was thereupon marked Defendants' Exhibit B For Identification.)

Q. (By Mr. Mellin): I hand you that ensemble marked Defendants' Exhibit B For Identification and ask you whether or not that is the type of rings which would latch together, which you say Granat Bros. produced in 1934 to overcome the shortcomings of this prior ring, Defendants' Exhibit A?

A. This is the set that we brought out to overcome the shortcomings of that previous set.

(Testimony of Joseph Norman Wineroth.)

Q. I call your attention to engraving within that ring and ask you what, if any, significance that has to you? Can you see it?

A. No, I can't.

(A magnifying glass was procured and the witness read as follows:)

“Jack to Doris, October 26,” I believe, “1934.”

Q. Do you know the history of the particular ring set I handed you?

A. Do I know the history of it?

Q. Yes. [45]

A. Well, frankly, I don't know just how to answer that. I don't know what you mean by that.

Q. How did this come into your possession? You gave it to me.

A. It was a set—in the retail store, the set was turned back for, let's see how to explain that to you—for exchange. In other words, that is a general practice in the jewelry business. If a person buys a set of rings and they wear it a certain length of time, if they want to buy a better set, the old set is turned back and a credit is placed against a larger sale.

Q. And Exhibit B For Identification came into your possession recently from that source?

A. It did not come into my possession. It came into Granat Bros. retail store and frankly it was shown to me, to show me how well the set had worn after so many years of wear, and then I remembered we had this thing involved and so I had it set aside.

(Testimony of Joseph Norman Wineroth.)

Q. Would you say that the date of 1934 would ordinarily, in the regular course of things, indicate the approximate date of purchase?

A. There would be no question about it.

Mr. Mellin: I offer that in evidence as Defendants' Exhibit B, your Honor.

(Defendants' Exhibit B for Identification was thereupon [46] received in evidence.)

Q. (By Mr. Mellin): I hand you a set of diamond wedding ring and engagement ring ensemble labeled Defendants' Exhibit C for Identification, and ask you if you recognize that set.

A. It is a set of our manufacture.

(The ensemble referred to was thereupon marked Defendants' Exhibit C for Identification.)

Q. (By Mr. Mellin): Did that have the mechanical locking feature? A. Yes.

Q. How does the mechanical locking or latching feature on that set compare with the 1934 set which is labeled Defendants' Exhibit B?

A. Just a moment. I want to get this straight. Exhibit B——

Q. That is 1934 platinum set.

A. That is exactly the same.

Q. Is the latching feature the same, or is it different? A. No, it is the same.

Q. The ring Exhibit C, as I understand it, is that of recent Granat production?

A. That is of recent, yes.

(Testimony of Joseph Norman Wineroth.)

Mr. Mellin: May I offer this Defendants' Exhibit C in evidence?

(Defendants' Exhibit C For Identification was thereupon received in evidence.)

Q. (By Mr. Mellin): I hand you Plaintiff's Exhibit 1 and ask you [47] if you have ever seen the drawing in that patent before. A. Yes.

Q. Would you state whether or not the construction of the latching feature shown in that patent, Plaintiff's Exhibit 1, is the same or different from the latching feature on the two rings, Defendants' Exhibit B and C which you just identified?

A. This is the same locking feature as on the two rings you just showed me.

Q. That is Defendants' B and C. Now, did you personally have anything to do with the sale of rings such as Defendants' Exhibit B and C, say, in 1934, 1935, 1936 and 1937?

A. Very much so.

Q. Will you tell us what was done by you with respect to selling these rings throughout the United States, if you did, during that period commencing in 1934?

A. Well, the rings, when they were brought out at the factory, naturally we assembled them with the diamonds and all and put them in our line, and they were sold by us to the stores that we sold to and then also sold to our distributors. Of course, they in turn, would sell them to their dealers.

Q. Did you, yourself, have anything to do with contacting dealers with respect to these particular rings B and C?

(Testimony of Joseph Norman Wineroth.)

A. Oh, yes, I personally sold quite a few of them.

Q. Will you tell us briefly what reception they got from the trade when you so introduced them or tried to sell them? [48]

A. Frankly, the trade was very enthusiastic over the locking feature of the ring. It was a feature they had been looking for. In other words, there were many instances, as I said in one of my previous remarks here—it was something to get away from this appearance of separation on the finger, and they were very enthusiastic about the ring, that is, the locking feature.

Q. Are your duties and your position such with the L. H. Giacobbi & Co. and the Granat Bros. Manufacturing Company that you would have knowledge of the approximate number of these ensemble sets such as in Exhibits B and C which were manufactured and sold by your concern, say, commencing with the year 1934?

A. Oh, yes, very definitely.

Q. I asked you the other day to examine the books of both the L. H. Giacobbi & Co. and the Granat Manufacturing Company to determine the amount manufactured of these particular rings during that period? Did you do so?

A. Frankly, we do not keep records that far back.

Q. Would your records be in such shape at any time so you could distinguish latching type rings from non-latching type rings?

(Testimony of Joseph Norman Wineroth.)

A. Yes, if it was recent—you see, at one time we didn't have that system of keeping accurate records, but, of course, in the last three or four years we put in that system. But prior to that I couldn't—I could tell you how many rings we sold and what they amounted to, but I couldn't give you the exact figures. [49]

Q. As I understand it, during the period 1934, 1935, 1936 and 1937, or in that period, you would have knowledge, wouldn't you, of the approximate amount of rings that you have sold, in money, all rings?

A. Yes.

Mr. Trabucco: Of course, these questions are leading, your Honor. I have not objected.

Mr. Mellin: I did not give him the answer. I asked him if he had knowledge.

Mr. Trabucco: You suggested what the answer would be.

The Court: You have reframed the question and asked him if he has knowledge?

Mr. Mellin: I asked him if he had knowledge.

Q. Do you have that knowledge?

A. Of how many——

Q. In money.

A. Well, yes. What were the years?

Q. Say 1934, 1936, 1938, and 1939.

A. At that time we did a business of a half million dollars.

Q. A year? A. In a year.

Q. In money? A. Money.

Q. That is all types of rings?

A. Everything we sold. That is all we did sell, frankly, outside [50] of some loose diamonds. We

(Testimony of Joseph Norman Wineroth.)

sold a certain amount of loose diamonds, but the biggest percentage of our volume was done in diamond rings.

Q. And that would be in an amount of about \$500,000 a year? A. Yes.

Q. Will you state the approximate proportion of that that would be represented in those years by these latching type rings B and C?

A. Frankly, in volume, now, it would probably represent between 18 and 22 percent of our sales.

Mr. Trabucco: I object to this question, your Honor, for the reason that there are several types of interlocking ring ensembles manufactured and sold by the defendant, and it seems to me the testimony should be directed to each type of interlocking ring and engagement ring so we can distinguish how many sales of each type were made.

Mr. Mellin: I am referring solely, and my question may be deemed to be referring solely to the type of latched rings represented by Exhibits B and C, which you had before you.

The Witness: I figure I gave you—I can only tell you about that particular ring, because that is the only ring we manufactured at that time. We had no other type.

Q. (By Mr. Mellin): You would say, then, of your total sales volume during the years 1934, 1935, 1936, 1937, and 1938, of that approximately 22 percent—— [51]

A. I would say anywhere from 18 to 22 percent. It is difficult to give you an exact figure.

(Testimony of Joseph Norman Wineroth.)

Q. —would be represented by sales of rings such as Exhibits B and C?

A. That is right.

Q. Did you continue the sale of those rings after the years 1937 and 1938? A. Oh, yes.

Q. Are those being manufactured and sold by the Granat Bros. and the L. H. Giacobbi Co. today?

A. Oh, yes, we have never stopped selling them.

Q. During the years, say, between 1934 and 1941, when the war started, were you in the business of manufacturing any type, and in selling any type of wedding ring and engagement ring ensembles that had a mechanical latching means other than these Exhibits B and C?

A. Up to what time?

Q. Say up until the time of the recent World War. A. No.

Q. By what trade name were these rings that we have been speaking of, B and C, known in the trade? A. "Wedlock."

Q. You are familiar, aren't you, somewhat with the advertisements in the City and County of San Francisco of the "Wedlock" rings that we have been discussing, the advertising of "Wedlock" rings? [52] A. Very familiar with that.

Q. You handed me yesterday, and I am handing you now, what you said were representative samples of advertisements of "Wedlock" rings, and will you give us the dates of those advertisements and tell us whether those actually appeared in the publications?

(Testimony of Joseph Norman Wineroth.)

A. Well, they actually appeared. This one here is dated June 1, 1941.

Q. Would you look in the back of the reduced photostatic copies of such advertisements and give us the earliest date?

A. This one is February 5, 1939.

Q. Is that the earliest date of all of those in the book?

A. That is the earliest date, I believe. Yes, the earliest date in here would be——

Q. Do these represent copies of all the advertisements of such "Wedlock" rings which appeared in San Francisco during those periods, or not?

A. Well, I wouldn't think so. I would think there would be more than those.

Q. Would you notice the rings appearing in those advertisements and tell me whether or not those rings so exhibited therein are or are not rings such as Exhibits B and C in evidence?

A. This is the same ring.

Q. In all of the advertisements?

A. Well, I have not looked at all of them now.

Q. Would you do so, please? [53]

A. I would say this ring appears in all these ads.

Mr. Mellin: May I offer those advertisements in evidence, your Honor, as Defendant's next in order?

The Court: Admitted.

(The advertisements referred to were thereupon received in evidence and marked Defendants' Exhibit D.)

Q. (By Mr. Mellin): Commencing with the time of World War II, late in 1941, would you state whether or not you manufactured a ring of a different latching structure than the one in suit? A. The start of what war?

Q. Say in 1942, right at the time of the start of the World War.

A. I will tell you. There was a change in style and we brought out—the demand was for a narrow ring, and this particular feature did not lend itself to locking of what we call a tailored ring. So we worked on another idea which we are now making as well. We had it ready to market, and when the war came along we just set it aside for the simple reason that conditions were such that we could sell anything we made. It was a ring that required more man hours of labor—both of those rings, in fact, this type of ring and the one I am speaking about now required more man hours of labor, and we set it aside and went ahead and manufactured the simplest type of ring, as we had a very much reduced crew in our factory, and to fill the demand we just made the simplest form of rings. [54]

Q. That is the form of rings without the latching means?

A. Yes, but we had this ring. We had this other locking ring and were holding it in readiness until the time that we felt we could manufacture it.

Q. What is the style trend now, if it is anything different?

(Testimony of Joseph Norman Wineroth.)

A. The style trend now is coming back to this wider type. The price ranges are changing. People have less money to spend and they want a showier ring. We have to have a ring with more body to it. We are going back to that other type. With changing conditions your price lines change.

Q. Are you acquainted with the plaintiff, Ralph D. Gomez? A. Yes, I am.

Q. I understand he had some business dealings with the L. A. Giacobbi & Co., is that correct?

A. Oh, yes.

Q. And you dealt with him personally, at times?

A. Well, yes.

Q. Will you give us briefly, in your own words, the connection between Mr. Gomez and the L. H. Giacobbi & Co.?

A. Gomez Bros.—Ralph was one of them—they were in the diamond setting business. They were a firm of diamond setters. As I have mentioned previously, we would receive these rings from our factory and the diamonds we would import from Europe. When we got the rings it became naturally necessary to set them, or have a diamond setter set them. We were doing as much setting [55] as we could in the factory, and the overflow, as we call it, we would farm out, and we would farm them out to Gomez Bros., and they would do setting for us.

Q. When did this association commence, Mr. Wineroth?

(Testimony of Joseph Norman Wineroth.)

A. Well, I don't know exactly, but I think I would safely say—I know we have the records in our office for expense. It goes back to 1938.

Q. 1938?

A. That is as far back as I could tell you. It might have been before that. I don't remember.

Q. Did they set diamonds in wedding ring and engagement ring ensembles? A. Yes.

Q. During the period of 1938, 1939, 1940 and 1941, what type of rings were sent to them for the setting of diamonds?

A. We sent them everything—that is, everything that came down from the factory. There was no particular type given to them. It was just anything that came in.

Q. That is the general run that came from the factory, say, in the proportion that you were selling?

A. That is right—say that again?

Q. I mean in the proportion of the various types you were selling.

A. Oh, yes, they got some of everything.

Q. Would that include or would it not include ensemble sets as represented by Exhibits B and C in evidence? A. I would say so, yes.

Q. I asked you to look at your records and tell us how much money you paid to Gomez Bros. for setting diamonds for you during that period of 1938, 1939, 1940 and 1941. Do you have those records with you? A. I do.

Q. And these were on engagement rings and wedding rings of all types and, as I understand

(Testimony of Joseph Norman Wineroth.)

it—and I am not attempting to lead you and you can answer my question directly—would that include the normal 18 to 22 percent of these rings B and C? A. I would say so, yes.

Q. Will you give us those figures, please?

A. In 1938 they did this work that amounted to \$2698.

Q. How much would that represent in number of rings.

A. I am only guessing at this figure, because I have no way of telling, but at that time we paid about 20 cents a stone on an average to set, and if that was true, it would be about 3500 rings. I am figuring an average.

Mr. Trabucco: If the Court please, I object to this question. After all, I see no reason why Mr. Gomez' association with the defendant should be brought into this case.

The Court: Yes. What is the purpose?

Mr. Trabucco: After all, the patent was issued in 1934. It was public knowledge as to what the construction was, and I [57] can't see why any association between the defendant and the plaintiff would have any bearing on the issues of this case, and I object to the questioning.

The Court: What is the purpose of this?

Mr. Mellin: The purpose is this: We want to prove by this evidence that our ring was copied by Mr. Gomez, and he having these particular rings of the plaintiff, rather of the patent owner, the particular rings in his possession, he saw the construction and copied them. If counsel wants to stipulate that they were copied and Mr. Gomez had full

(Testimony of Joseph Norman Wineroth.)

knowledge of them before he started to produce them, I will stop this line of testimony.

Mr. Trabucco: No, I won't do that. Mr. Gomez tells me he has never seen any of these rings prior to the time he was notified by Mr. Gardner, the then attorney for the defendant, of infringement. So I will not stipulate to anything like that.

The Court: I thought there was going to be no issue of infringement?

Mr. Mellin: There is not, your Honor. It is a question of copying. I want to show willful and deliberate action.

The Court: Are the parties agreed that if the validity of the patent is established there is infringement?

Mr. Mellin: That is correct. That is the stipulation, but we have this point—it goes to two points: One, we claim the infringement was willful and deliberate, which goes to [58] treble damages, and also goes to attorneys fees, and we want to show that the stage was set, that there was the access.

The Court: That issue——

Mr. Trabucco: That is something new in this case. There is no request for treble damages, as I recall.

Mr. Mellin: I did not prepare the pleadings, but I never saw one without it. It is in paragraph C, your Honor, of the cross-complaint. It prays that treble damages be awarded cross-complainant for willful nature of the infringement.

Mr. Trabucco: Even so, your Honor, after all the patent in suit was issued in 1934. It was no

(Testimony of Joseph Norman Wineroth.)

trade secret or anything of that kind. It was public knowledge. Anyone had the right to get a copy of the patent, and whatever he learned by his association should not have any bearing on this suit, as I see it.

The Court: It would have a bearing with respect to this cross-complaint, though, wouldn't it?

Mr. Trabucco: Well, let us go ahead.

The Court: I will overrule the objection.

Mr. Mellin: If your Honor please, I have been going on the assumption, and the testimony adduced in the case goes both to the issues raised by the cross-complaint as well as the main complaint, because the issues are the same.

Mr. Trabucco: Well, there was one cause of action dismissed, you know.

Mr. Mellin: That is what I meant. I meant the issues that [59] are still here.

The Court: I will overrule the objection.

(The last question was read by the reporter.)

Q. (By Mr. Mellin): That was in 1938. How about the years 1939, 1940 and 1941? Do you have those figures—have you?

A. Yes, I have. In 1939 the amount of rings would be about 1600. In 1940, for some reason or other, it went down to 400, and then in 1941 it went back to 3400. I am basing that on the amount of money spent. In 1934 it was 1206, and then it dropped to \$304, and in 1941 it went up to \$2502.

Q. From your knowledge of the merchandising of wedding rings and diamond engagement rings,

(Testimony of Joseph Norman Wineroth.)

will you state whether or not between the period of 1934 and, say, 1942, any rings other than the rings Exhibits B and C manufactured by Granat Bros. having a mechanical latch, appeared on the market commercially?

A. I never did see one.

Q. There are some now, are there?

A. There are.

Q. When did they commence to appear?

A. Well, in the last—just about this year, the beginning of this year.

Mr. Mellin: That is all. Cross-examine.

Cross-Examination

Q. (By Mr. Trabucco): Mr. Wineroth, your firm is manufacturing various types of ring ensembles, isn't that true? [60]

A. I would like to straighten you out on that. From force of habit I keep saying we are manufacturers. Specifically, my firm is not a manufacturer. There are two separate firms.

Q. You are selling different types?

A. Selling, I am.

Q. And it is the fact, is it not, that Granat Bros. own patents on various types of ring ensembles? A. Yes, they do.

Q. At the present time what type of ring ensembles is being made and sold more extensively than the other type?

A. More extensively than the other types?

Q. Yes.

A. Well, we have a type which is a little different type than Exhibits A and B, that you refer to there.

(Testimony of Joseph Norman Wineroth.)

Q. Does it have a dove-tailed interconnecting means? A. No, it does not.

Q. Are you manufacturing that dove-tailed type of connecting ring now?

A. Frankly, we have several types of interlocking rings and we are manufacturing all of them. We have never stopped manufacturing any type. We have made improvements and made different types, and we continue to manufacture all of them.

Q. That is true, but I have before me two other patents other than the one which is in suit here; one is 1,982,864.

A. Frankly, you would have to show me the picture. The number [61] doesn't mean a thing to me.

Q. This, I believe, is a type where the projection extends into a hole in one ring.

A. Yes, that is right.

Q. Would you say that you are manufacturing the type of ring in 1,982,864?

A. Yes, we are manufacturing this one.

Q. Are you manufacturing that exclusively?

A. No.

Q. What other types are you manufacturing?

A. As I told you, we have several types.

Q. Will you please explain what other types you are manufacturing?

A. We have a snap type, too, that we are manufacturing.

Q. Any other type?

A. That is the only two I know of.

Q. Your testimony here has been directed to

(Testimony of Joseph Norman Wineroth.)

what counsel refers to as mechanical connecting type rings. A. Yes.

Q. That is a rather general term. The prior art shows many types of mechanical connections between rings. Would you please distinguish and point out to the court what particular type of mechanical connecting means you are now employing in the manufacture of rings?

A. We are employing this type that was shown to me there. [62]

Mr. Mellin: Exhibits B and C.

The Witness: Exhibits B and C, and we are manufacturing and selling another type that has not even been shown here.

Q. (By Mr. Trabucco): That I believe is the one——

A. No, you don't even have a photograph or picture of it.

Q. Prior to the issuance of the patent in suit there was a patent issued to J. Granat, 1,982,846, which shows a mechanical connecting type of ring. Is that the type——

A. That is the type you showed me.

Q. Did you first commence the manufacture of that which I just showed you first?

A. That is our first ring.

Q. Which one?

A. The one you just showed me.

Q. This patent that I have in my hand was issued prior to the patent in suit.

A. Pardon me. Can I see those again?

(Testimony of Joseph Norman Wineroth.)

Q. Yes. A. Now, what was the question?

(Question read.)

A. Are you trying to say there was a patent issued before this?

Q. (By Mr. Trabucco): I am referring to the patent you have in your hand, 1,982,864, and I will ask you again, was that the first type of ring ensemble that was manufactured by Granat Bros.? [63]

A. The first type of ring ensemble?

Q. Yes.

A. It is not the first type of ring ensemble.

Q. It was the first type that you commenced to manufacture?

A. You asked a question there; you said "ring ensemble."

Q. Yes, comprising two rings locked together.

A. That is a different question. Locked together with mechanical lock?

Q. Yes.

A. I would say this is the first. I am not too familiar with all these patent numbers and things.

Q. The one shown in 1,982,864. Then that was the first type that you commenced to manufacture?

A. If you showed me samples of rings and not drawings or numbers, I can tell better.

Q. I will show you the one I referred to and ask you to examine these drawings.

A. It looks like it. I can't answer that—I mean that way.

(Testimony of Joseph Norman Wineroth.)

Q. How many rings and for how long did you continue to manufacture the ring ensemble shown in patent 1,982,864?

A. If this depicts the sample ring shown to me in Exhibit A and B, whatever it is, that ring we first brought out in about 1934 and we have manufactured it continuously since then.

Q. The ring that I am referring to is not the one shown in Exhibit A and B but is another type.

A. Then I can't read this. I can't answer that. You will have to show me rings. I am not an expert on drawings. I know rings.

Q. You never manufactured——

A. If you show me the ring I can tell you, but I don't know here what I am looking at.

Q. Will you describe the ring you first manufactured?

A. If you show me the ring I will answer.

Q. Describe the ring you first manufactured.

A. Describe the ring?

Q. Yes, the connecting means between the rings.

A. You have a sample there that I can show you.

Q. Will you kindly explain what type it was?

A. There were two rings; one had a male, the other a female part. That is the only way I can tell you.

Q. Did one have a lug and the other an opening?

A. That is right.

Q. The opening was in the side of one of the rings?

A. The opening was in the side and the lug was on the wedding ring.

(Testimony of Joseph Norman Wineroth.)

Q. That particular type of ring shown in patent 1,982,864, is it not?

Mr. Mellin: If your Honor please, this is a little outside the scope of the direct examination, asking him about a patent that is not even involved.

The Court: I think it calls for his opinion, and inasmuch as I would not want to let the patent experts testify to that, I do [65] not think I should let this witness testify about it.

Mr. Trabucco: There are various types of rings manufactured by the defendant.

The Court: Yes, but you are asking him for an opinion as to whether or not this patent covers that. I think he can't answer that, and I would not give any weight to his testimony if he did.

Q. (By Mr. Trabucco): Will you kindly describe the first ring that you manufactured, ring ensemble?

A. The first ring ensemble with a locking feature?

Q. Yes.

A. The first ring ensemble with a locking feature was a diamond set engagement ring and a diamond set wedding ring, and there was an opening on the engagement ring and a peg or whatever you would want to call it on the wedding ring. One was inserted in the other. Thereby they were locked in that fashion.

Mr. Trabucco: I will introduce this Granat patent 1,982,864 in evidence and ask that it be marked, it being the patented device just described by the witness.

(Testimony of Joseph Norman Wineroth.)

Mr. Mellin: If your Honor please, I object to that as being a complete misstatement and I also object on the ground that that patent is immaterial. It is not in suit. It is not being offered as prior art. The witness testified he did not know how the ring shown there was made. The witness has said the ring that was made was like one of the physical exhibits, and counsel is stating that the witness said it is like the ring described by the witness. [66]

The Court: I am not following this. I do not know what the purpose of it is. This is an earlier patent than the one in suit.

Mr. Trabucco: Yes, and the defendant has testified generally that they manufactured a large number of interlocking type rings, while at the same time they had several patents covering different types of interlocking rings. Now there is only one patent involved in the suit, and that is the type that has the tongue-and-groove, dove-tailed connection, and the one just described——

The Court: But I do not see the point of this examination.

Mr. Trabucco: This goes to treble damages. I want to be sure that my client has manufactured a ring which would come within the scope of the patent in suit.

Mr. Mellin: Your Honor, there is no issue here. It was stipulated if the patent is valid it was infringed.

The Court: I understand if the patent in suit is declared valid, it was infringed.

(Testimony of Joseph Norman Wineroth.)

Mr. Trabucco: I agree with you, your Honor, but——

The Court: You are not trying to present some evidence that your client infringed some other patent as well?

Mr. Trabucco: That hasn't any bearing on this case, but the point is you allowed testimony on the theory that treble damages was involved. This goes to the question of how much those treble damages would be. [67]

The Court: I do not want to tell you what to do, Mr. Trabucco, but I think that that would be something that you would steer away from rather than to bring up.

Mr. Trabucco: I merely want to show that there were other types of rings being made and sold by the defendant, that the so-called commercial success was not due to the manufacture and sale of this particular type of ring which is embodied in the patent in suit, but whatever sales can be attributed to this particular type of ring may be attributed to the patent that I just introduced in evidence, or offered in evidence.

The Court: Your opponent does not contend that. He said they manufactured several kinds. The witness has already testified to that.

Mr. Trabucco: I objected to that testimony.

The Court: It is not quite clear to me what you are trying to do.

Mr. Trabucco: It is not of consequence, but I do not want this commercial success contention to influence the issues in this case in any way.

(Testimony of Joseph Norman Wineroth.)

The Court: You are entitled, of course, to re-examine him on this question of whether or not the rings manufactured pursuant to the patent in suit had commercial success, but I do not see what some other ring manufactured according to some other patent would have to do with it.

Mr. Trabucco: The point is if rings manufactured by the defendant embodied another construction other than that covered by the patent in suit, whatever success in this particular enterprise was had would be attributed to the ring that was sold more extensively.

The Court: You mean you want to show that whatever commercial success there was in connection with rings other than rings manufactured—

Mr. Trabucco: Yes.

The Court: And there was no commercial success at all dependent upon the rings manufactured pursuant to the patent?

Mr. Trabucco: I do not say any commercial success, but I say the majority of the commercial success or the most commercial success involved could be attributed to another type of ring which was sold and manufactured by the defendant.

The Court: I do not want to shut you off on this if you think there is something there of importance, but I do not quite see the relevancy of the testimony that because there was commercial success in some other ring, that that means there was not commercial success in the particular ring with which we are concerned here. That is not

(Testimony of Joseph Norman Wineroth.)

claimed, that that was the only ring that was manufactured.

Mr. Mellin: Our contention, your Honor, is that the exhibits we offered were the only latching type—that is B and C, I think—were the only latching type of mechanical latched rings that were sold by the plaintiff or under the plaintiff's [69] patent from 1934 to at least 1941. That was the only type. There wasn't any other type sold. That was the only type. Then the witness testified that that latch was the same as the patent in suit. Now, they bring up another patent and by broad language try to incorporate it in evidence, and I say that that is totally immaterial. If the rings sold followed the patent in suit, and those were the only rings they sold, then we say the commercial success is attributed to the patent in suit. They did sell later, which I brought out, because counsel insisted, because of a style change, some other type of latching device but I did not go into that. I stayed within Exhibits B and C.

The Court: I think counsel would have the right to proffer this other patent if he wishes to make the argument, if he has basis in fact that the rings manufactured were in accordance with this patent and not the other.

Mr. Mellin: I agree, your Honor, for that purpose, but I do not see how he can examine this witness who never saw a patent on it.

The Court: That was the point of my sustaining an objection. I do not think the witness can testify to that.

(Testimony of Joseph Norman Wineroth.)

Mr. Trabucco: The only point is the witness described the construction shown in this exhibit.

The Court: That, I think, is immaterial.

Mr. Trabucco: I will offer this in evidence. [70]

The Court: You may offer that patent in evidence and make such deductions and argument from it that you wish.

Mr. Trabucco: Yes.

(The J. Granat patent 1,982,864 was received in evidence and marked Plaintiff's Exhibit 4.)

Q. (By Mr. Trabucco): Then as a matter of fact you have manufactured various types of ring ensembles, having various kinds of interlocking connections between them since the issuance of the patent in suit, is that not true? A. Yes.

Q. You have no knowledge as to whether any ring ensembles having mechanical locking means were sold prior to 1934, have you?

A. I can truthfully tell you I have never seen one and I have never heard of one in the jewelry business who has seen one.

Q. Are you familiar with the Thomas patent?

A. No, I am not.

Q. If I showed it to you would it recall to your memory having seen a ring of that type?

A. As I told you before, sir, I can't read mechanical drawings. If you showed me the actual rings I could tell you.

Q. Are you familiar with the Feature Lock Ring?

(Testimony of Joseph Norman Wineroth.)

A. Am I familiar with that? Yes.

Q. What type of connection has it?

A. It has a locking device that you have to turn the rings [71] around, but I might——

Q. That is being manufactured by some competitor of yours, is it not?

A. That is right.

Mr. Mellin: Your Honor, may I object to this line of testimony unless these rings were the rings that were produced within the last year and came on the market under various trade names. Unless it is first shown that they are prior to the patent in suit, I think it is completely immaterial whether or not other people are infringing. That is no excuse for the plaintiff's infringement.

Mr. Trabucco: It is material because a feature locking ring is a ring manufactured by a competitor of the defendant and it is manufactured in accordance with the Thomas patent, which has long since expired.

The Court: Are you asking some question of the witness now?

Mr. Trabucco: I merely asked him if he was familiar with that.

The Court: He said he was not.

Mr. Trabucco: He said he was familiar with the feature lock type of ring.

The Court: Yes.

Q. (By Mr. Trabucco): Do you know whether or not the feature lock type ring performs the same functions as the locking means of your rings?

(Testimony of Joseph Norman Wineroth.)

Mr. Mellin: If your Honor please, I still insist and still object until it is first shown that this feature lock ring was put out more than two years prior to 1934, which is the date of the application of this patent. No matter what rings came out in 1947 or 1948, that has no bearing on whether there was an invention in 1934 of this ring. It is completely immaterial. It is almost fourteen years after the fact. I can't see the materiality of it. If he cannot connect the feature lock ring in argument or some other fashion and show any evidence that it was put out prior to 1934, the date of the application, then it would be material, but because it came out in 1948, fourteen years after the fact of invention, how can it possibly bear on whether or not at that time an invention was made, or whether it was new?

The Court: Maybe counsel has means of showing it.

Mr. Mellin: He can't show it by this witness.

The Court: No, he is just establishing the fact that there is a feature lock ring, and it is being sold now.

Q. Is that correct? A. That is correct.

Q. (By Mr. Trabucco): Do you have any knowledge as to whether or not Mr. Gomez did work on the particular type of ring shown in Defendants' Exhibits A and B?

A. Do I have knowledge?

Q. Yes. [73]

A. That he did what?

(Testimony of Joseph Norman Wineroth.)

Q. Did any work for you with respect to that type of ring ensemble?

A. I would say yes. I want to qualify that statement. I never looked personally at every ring that was given to Mr. Gomez, but I know how the work was distributed, and as our rings came down from the factory we just put so many in an envelope and sent them in to our diamond department, as we call it, and the man in there picked out the Melese.

Q. Did you see any of the rings that went to Mr. Gomez? A. I saw a great many, yes.

Q. Did you see ensembles of the type shown in B and C?

A. You are asking me a question that I would rather not answer. In other words, I wouldn't swear on a stack of bibles that I have seen that particular ring. I wouldn't want to do that.

Mr. Trabucco: That is all.

Redirect Examination

Q. (By Mr. Mellin): Just to clear up the testimony, Mr. Wineroth, I again hand you Defendant's Exhibit C, which is a locking means such as you testified is in the patent in suit, and ask you if that is the one and only type of ring which you manufactured and sold between 1934 and 1941.

The Court: He has already said that. It doesn't do any good to have it repeated. He has already testified to that.

(Testimony of Joseph Norman Wineroth.)

Q. (By Mr. Mellin): Prior to that time did Granat Bros. manufacture [74] any other kind of mechanically latched ring?

A. None, whatsoever.

Mr. Mellin: That is all.

The Court: We will take a five minute recess.

RALPH D. GOMEZ

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Q. (By the Clerk): State your name to the court, please. A. Ralph D. Gomez.

Direct Examination

Q. (By Mr. Mellin): Will you give your age and residence, Mr. Gomez?

A. My age is 45; residence 15 Cranleigh Drive.

Q. San Francisco? A. San Francisco.

Q. You are one of the plaintiffs here?

A. I am.

Q. And you are a copartner in Gomez Manufacturing Company, the other plaintiff?

A. Yes.

Q. And that is a copartnership between yourself and William Henderson?

A. That is right. [75]

Q. Mr. Henderson is a resident of San Francisco, is he not?

A. No, he is a resident of Larkspur.

Q. Marin County? A. That is right.

Q. What is the nature of your business, Mr. Gomez? A. Jewelry manufacturing.

Q. What items do you manufacture?

A. I beg your pardon?

(Testimony of Ralph D. Gomez.)

Q. What items do you manufacture?

A. Diamond rings.

Q. Is that the only articles that you manufacture, just diamond ring ensembles?

A. We do some special other work, too.

Q. Is that in the nature of diamond setting, Mr. Gomez?

A. No, diamond setting and manufacturing articles outside of rings.

Q. How long have you been in the business of manufacturing ring ensembles?

A. About ten years.

Q. The ring ensemble we have been talking about is an engagement ring and wedding ring, is that correct? A. That is correct.

Q. How long have you been making an engagement ring and wedding ring ensemble in which there is a means of connecting the engagement and wedding rings together? [76]

A. Since the early part of this year.

Q. Since the early part of 1948?

A. That is right.

Q. Prior to that time you had been manufacturing engagement ring and wedding ring ensembles which did not have a particular kind of latching means to clasp the two together?

A. Not to clasp the two together, no.

Q. I hand you a wedding ring ensemble which is marked Defendants' Exhibit A For Identification and ask you if you recognize it.

A. Yes, I do.

(Testimony of Ralph D. Gomez.)

Q. Is that the ensemble that you manufactured, say, in the beginning of 1948? A. Yes.

Mr. Mellin: I offer this as Defendants' Exhibit E, it being the rings that were previously marked Defendants' Exhibit A on the deposition.

(The rings previously marked Exhibit A on the deposition of Ralph D. Gomez were thereupon received in evidence and marked Defendants' Exhibit E.)

Q. (By Mr. Mellin): I show you a page of "The Humboldt Times, Eureka, California, July 11, 1948," and I call your attention particularly to an advertisement of Mathes Jewelry, and I call your attention to the ring ensembles there illustrated, and I ask you if those ring ensembles there shown are those of your manufacture? [77]

A. They are.

Mr. Mellin: I offer the paper in evidence as Defendants' next in order.

(The newspaper advertisement referred to was thereupon received in evidence and marked Defendants' Exhibit F.)

Q. (By Mr. Mellin): I am going to hand you a copy of your deposition so you can check me if I read parts of it to you, Mr. Gomez. May I have Exhibit E? There may be a slight confusion here, your Honor, because we have it in the deposition as Exhibit A, and it is now Exhibit E, and if there is no objection on the part of counsel, when Exhibit A appears, may I read Exhibit E? Is that all right, your Honor?

(Testimony of Ralph D. Gomez.)

The Court: Very well.

Q. (By Mr. Mellin): I call your attention to page 7 of your deposition, Mr. Gomez, and ask you if these questions were asked you and these answers given by you:

“Q. Now, prior to the time that you commenced the manufacture and sale of rings like ‘Defendants’ Exhibit E had you known of rings having similar locking means manufactured and sold commercially prior to that time?

“A. No, I don’t—I didn’t.”

That question was asked and you gave that answer?

A. Exhibit A is the same one you showed here.

Q. Yes. A. Yes, sir. [78]

Mr. Trabucco: Show him the ring.

Mr. Mellin: We are now calling it Exhibit E, Mr. Gomez. I apologize for having it slightly confused.

The Witness: That is correct.

Mr. Mellin: That is a correct answer. I read you starting from line 6:

“Q. Now, prior to the time that you made——. Strike. How long have you been in the business in San Francisco?

“A. I have been in the business in San Francisco since 1927.

“Q. You keep yourself rather informed as to what competing manufacturers and sellers of wedding ring ensembles are producing and sell?

“A. Somewhat.

(Testimony of Ralph D. Gomez.)

“Q. I mean, that is a general thing to do in the jewelry trade, isn’t it?

“A. Well, I don’t pay no attention to what the other manufacturers are manufacturing. I just try to produce my own designs, according to the trade or the business.

“Q. Now, I show you a ring ensemble set which is marked ‘Defendants’ Exhibit C For Identification’; and I will ask you if you recognize that ring set?”

The Witness: May I call your attention to this question here that I have been in business in San Francisco since 1927, which is true, but not manufacturing.

Q. (By Mr. Mellin): I understand that, Mr. Gomez. [79]

A. Therefore I would not be interested in that time in what some other people were manufacturing.

Q. Those questions were asked and you gave those answers? A. Yes.

Q. You want to change that answer to that extent.

“Q. Now, I show you a ring ensemble set which is marked ‘Defendants’ Exhibit C for identification’.”

May I change that “C” to Exhibit B, with counsel’s consent.

“—and I will ask you if you recognize that ring set? A. No, I don’t.

“Q. For the purpose of the record, I will advise you that that ring set was manufactured by

(Testimony of Ralph D. Gomez.)

Granat Bros., the defendant in the present action; and I will ask you, with that information, whether or not you had ever seen ring sets like those offered for sale or by Granat Bros. prior to 1948?

“A. I never have.”

Q. Those questions were asked you and you gave those answers? A. That is correct.

Q. I continue:

“Q. Will you state that you had never seen any advertisements of Granat Bros. prior to 1948 of the ring set ‘Defendants’ Exhibit B’?

“A. No.”

The Witness: You have it Exhibit C here.

Q. It is Exhibit B, the same ring. [80]

“Q. Now, as I understand your testimony, and correct me if I am wrong, Mr. Gomez, the first time that you had ever seen a commercial ring set like and having the same locking means as ‘Defendants’ Exhibit E’ was at the time you produced that ring, is that correct?

“A. Yes. I produced my own rings. I didn’t understand the question.

“Q. Let’s get it straight then. A. O. K.

“Q. Now, I show you again ‘Defendants’ Exhibit E,’ and I will ask you if you had ever seen any rings offered for sale or commercially produced having a similar locking means prior to the time that you made rings like Exhibit E?

“A. No.”

Were those questions asked of you and those answers given by you? A. That is correct.

“Q. You never had? A. Never had.

(Testimony of Ralph D. Gomez.)

“Q. To your knowledge, you had no knowledge of the existence of any such rings?

“A. That’s right.

“Q. What led you to produce rings like Exhibit E, Mr. Gomez?

“A. It has been the trend in the jewelry trade for some years to have something that would keep the rings together on the fingers, as I illustrated, by the means of curved [81] wedding rings that are so built to set with the engagement ring in order to get together—in order to stay together. That was my manufacturing before I hooked these rings together by having exactly the same principle and the same design—the same as you see in the engagement ring—and having a little indentation in the wedding ring, so when the rings were on the finger, they were all together.”

That question was asked and you gave that answer, and it is a correct answer?

A. That is correct.

“Q. If you will excuse me just a minute, I am going to try to find a picture like that one so we can identify.

“For example, I show you a copy of Patent No. 1,724,130, issued August 13th, 1928, to H. M. Dayton, et al.; and does that generally describe what you have just been referring to as one ring having a curved socket of some sort, and the other ring having a small counterpart to fit it to keep them from relatively rotating?

“A. Somewhat, yes.

(Testimony of Ralph D. Gomez.)

“Q. That has been the action that you have been speaking of?

“A. This particular ring, you have the whole body of the ring. Yes, that would be. I would say that would be it. That is what I was speaking about as a curved wedding ring, [82] and that is the sort of curved wedding ring where it is curved to fit into the body of the engagement ring.”

The patent I have referred to is this Dayton patent. You were asked those questions and you gave those answers? A. Yes.

Mr. Mellin: May I offer that patent in evidence as Defendants' next in order, Exhibit G?

The Court: What is the name of that patent?

Mr. Mellin: Dayton.

(The Dayton patent referred to was thereupon received in evidence and marked Defendants' Exhibit G.)

Mr. Trabucco: I believe that is entirely immaterial. It does not show a construction at all similar to the type of ring embodied in the patent in suit. I see no reason why it should be introduced in evidence.

Mr. Mellin: I agree it does not show a similar type of ring, but it illustrates the witness' testimony of what he was making before he made the infringing ring.

The Court: I see.

The Witness: This question doesn't answer that correctly.

(Testimony of Ralph D. Gomez.)

The Court: Wait until there is a question.

The Witness: I am sorry, your Honor.

Mr. Mellin: I am reading now from page 12 line 8, Mr. Gomez:

“Q. What was the reason after making those that you started making rings such as shown in ‘Defendants’ Exhibit E? [83]

“A. As I said before, it has been the trend in the trade for many years to find——

“Q. An efficient means to hook them together?

“A. Yes; to hold them together.

“Q. This prior ring that you were making as illustrated in the sketch, ‘Defendants’ D,’ did that hold them together?

“A. Not as well as they do now.

“Q. Not as well as ‘Defendants’ Exhibit E?’

“A. That’s right.

“Q. So you considered that the ring, ‘Defendants’ Exhibit E,’ was an improvement over the type that you previously manufactured, ‘Defendants’ D For Identification’?

“A. That’s right.”

Q. Were those questions asked you and those answers given, Mr. Gomez?

A. Yes, that is correct.

Mr. Mellin: May I offer in evidence a sketch, your Honor, which is referred to in the deposition as Defendants’ Exhibit D For Identification, as Defendants’ next in order?

(The sketch referred to was thereupon received in evidence and marked Defendants’ Exhibit H.)

(Testimony of Ralph D. Gomez.)

Mr. Trabucco: It is to be understood, your Honor, in this matter a page was omitted by counsel, and that the testimony just given and read by counsel refers to this particular sketch [84] and not to the construction of the ring ensemble that he actually manufactures now.

Q. (By Mr. Mellin): Those questions were asked you and you gave those answers?

A. Yes.

Q. I am referring to the bottom of page 13:

“Q. Now, approximately how many sets such as ‘Defendants’ Exhibit A For Identification’ in round numbers have you made and sold since the commencement of 1948? A. Well—

“A. Perhaps 800 sets.

“Q. 800 sets. During that time how many sets would you guess that you made of the type of ring shown in ‘Defendants’ Exhibit H’?

“A. I would say at least as many.

“Q. Just as many. About 800 sets of each?

“A. That’s right.

“Q. How long have you known of Granat Bros. jewelry concern here in San Francisco?

“A. Oh, since 1928. ’27, rather.

“Q. You were familiar with the fact they were wholesale jewelry manufacturers during that period? Isn’t that correct?

“A. No, not during that period.

“Q. During what period, as far as your recollection concerns [85] it?

“A. About the only knowledge that I had was that they were retailers’ manufacturers, and then

(Testimony of Ralph D. Gomez.)

a distributor in San Francisco was distributing the merchandise, from which I had a knowledge through the distributor rather than the concern itself.

“Q. I see. But you didn’t know all during that period that they manufactured ring ensembles?

“A. Yes. I knew that, yes.

“Q. During all that period you also knew that they had a retail store here in San Francisco?

“A. That’s right.

“Q. You never tried to sell them merchandise, did you? A. No, never did.

“Q. Did you ever sell them merchandise?

“A. No, I haven’t.

“Q. How long have you known of the Granat trademark for wedding ring ensembles ‘Wedlock’?

“A. That, I am afraid, I wouldn’t be able to answer you, because I don’t particularly pay much attention to the different names and different trade names at all.

“Q. But you had heard of it?

“A. Oh, yes, I had. Absolutely, I have heard of them, yes. In fact, I read in the papers—that in the newspapers every week. [86]

“Q. But, I mean, you heard of that ring ensemble being sold by Granat under that trademark long prior to 1948, didn’t you?

“A. Well, I wouldn’t say that, because they had another name which I was more familiar with than this other one. That was ‘Interlock.’

“Q. Were you familiar with the ‘Interlock’ rings? A. Yes, I was.

(Testimony of Ralph D. Gomez.)

“Q. You read the trade journals rather carefully each issue, like the rest of the jewelers?

“A. No, I don’t.

“Q. You don’t pay any attention to them?

“A. Not much. Of course, I read through it very lightly.

“Q. If the ‘Wedlock’ wedding ring, such as is marked for identification ‘Defendants’ Exhibit B,’ was illustrated therein, you would have seen it, wouldn’t you, prior to 1948?

“A. Yes, I would.

“Q. If the newspapers in San Francisco had advertised ‘Wedlock’ ring ensembles for sale prior to 1948, you would be more than likely to have seen those, wouldn’t you?

“A. I would have, yes, sir.

“Q. I just want to make certain that we are not misunderstanding each other. As I understand your testimony, it is that you had never seen any rings put out by any one else but yourself which incorporated this locking feature that is embodied in the rings marked ‘Defendants’ Exhibit B’? [87]

“A. That’s right.”

Those questions were asked you and those answers were given by you, Mr. Gomez?

A. Yes.

Q. And they are all correct?

A. The exhibit has a different letter, but that is all right, isn’t it?

Q. I changed it to correspond, with your counsel’s permission.

I go to page 17, line 15:

(Testimony of Ralph D. Gomez.)

“Q. But you never saw a Granat Bros. product such as Exhibit B? A. Never did.

“Q. Or having the particular kind of locking means shown or embodied in Exhibit B?

“A. No.

“Q. That is, prior to 1948?

“A. That’s right.

“Q. Now, outside of Granat Bros. locking ring, had you seen any other ring ensembles which locked together prior to 1948?

“A. Yes. I saw the Mel Harris.

“Q. The what? A. Mel Harris.

“Q. Mel Harris? A. That’s right. [88]

“Q. Do you know the trade name of that ring?

“A. No, I don’t.

“Q. As you recollect, how was that constructed?

“A. Well, that is connected by means of a pin on the bottom of the shank.”

I am skipping to line 21 on page 18:

“Q. What about the Mel Harris ring? When did you first see that?

“A. Oh, perhaps a year, two years ago.

“Q. Not before then? A. No.

“Q. Now, I show you a prior patent, which is cited in this litigation, No. 424,211; and calling your attention to the pictures, have you ever seen a commercial ring made like those illustrated?

“A. Yes, I have.

“Q. When?

“A. Oh, perhaps three or four years ago.

“Q. Not before that time?”

(Testimony of Ralph D. Gomez.)

Q. Those questions were asked of you and you gave those answers, and they are correct answers?

A. Yes.

Q. Then I showed you patents, Mr. Gomez, isn't that so, at that time?

“Q. I show you patent No. 464,749; and ask you if [89] you ever saw a ring put out commercially that was built like that?

“A. I have to——. No, I don't have a recollection right off now. Perhaps if I think any further, I may come to a ring that might have been sold commercially with that.

“Q. I just want whether you recall whether you saw any ring like that before.

“A. I don't recall just at present.

“Q. I show you patent No. 1,536,540, and ask you whether you ever saw a ring sold like that commercially.

“A. Yes. They are being sold commercially now.

“Q. I know they are. But how long have you known of that ring being sold commercially?

“A. No, I can't say that I remember.

“Q. That has been within the last two years, hasn't it, Mr. Gomez? A. What?

“Q. It has only been within the last two years that rings like the patent I just showed you—1,536,540—have been sold commercially? Isn't that so?

“A. Well. I don't think so. I think a lot of these connecting features have been sold in the past, many years ago. I mean, just like the ones

(Testimony of Ralph D. Gomez.)

shown there. Just like those, and many others like this other one. That feature in the jewelry industry has been in existence for many, many years [90] in one form or the other. Whether it pins, or it pulls, or pushes, those connections have been manufactured in many, many forms.”

Q. Those questions were asked and you gave those answers and they are correct? A. Yes.

Q. I turn to page 21, line 2:

“Q. Now, I show you Patent 200,228, and ask you if you saw a ring such as illustrated there sold commercially?

“A. Oh, yes. This is Mel Harris’s.

“Q. Is that the Mel Harris ring that you were referring to?

“A. Yes, that’s right. You see, it has the slot down at the bottom of the shank here. Apparently it has another one on top.

“Q. When did you first see that one?

“A. Oh, perhaps a year and a half, two years ago.”

Q. (By the Court): Have you read over your deposition? A. Yes, I did.

Q. All the answers in there are correct?

A. Yes.

The Court: All right. Let that answer stand and you can call my attention to any further testimony in that deposition you wish.

Mr. Mellin: I am not going to read any further. I was through. [91]

Q. And those questions I read you and those answers you gave were given on your depositions and the answers are the correct ones?

(Testimony of Ralph D. Gomez.)

A. That is correct, with the exception of that point in here that I called your attention to. I was referring not to the ring I was making, but I was referring to the curved wedding ring that fits the body of the ring. That is not similar to the one I was making. The one I was making is different from that particular one.

Q. Do you have with you one of the rings you were making? A. Yes, I have.

Q. Did this have a mechanical latch?

A. No, it has not.

Mr. Mellin: May I offer these rings in evidence with your permission, Counsel?

Mr. Trabucco: I was going to introduce them, myself.

Mr. Melin: I will introduce them as Defendants' Exhibit next in order.

(The rings referred to were thereupon received in evidence and marked Defendants' Exhibit I.)

Q. (By Mr. Mellin): The Defendants' Exhibit I, which are the rings you just handed me, are the rings which you made prior to 1948 when you commenced making a ring which mechanically latched together? A. That is correct. [92]

Q. Such as Defendants' Exhibit E?

(Testimony of Ralph D. Gomez.)

A. That is correct.

Mr. Mellin: That is all.

Cross-Examination

Q. (By Mr. Trabucco): The inference has been made here that you might have seen a ring ensemble manufactured by the defendant, Granat Bros., having a mechanical locking feature. Have you or did you prior to the manufacture of your ring in 1948 ever see a ring of that type?

A. Never did see one.

Q. When did you first learn of that particular type of ring manufactured by the defendant?

A. When Granat Bros. wrote me with reference to infringing its patent. Until then I had no knowledge whatsoever that they had that particular type.

Q. That was a letter addressed to you by Mr. Gardner, of Oakland? A. Mr. Gardner, yes.

Q. That was in the spring of this year, is that not true? A. That is correct.

Mr. Trabucco: That is all.

Mr. Mellin: No further questions. [93]

FORREST R. QUICK

was called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the court?

(Testimony of Forrest R. Quick.)

A. Forrest R. Quick, 2950 Van Ness Avenue,
San Francisco.

Direct Examination

Q. (By Mr. Mellin): What is your age, Mr. Quick? A. 51.

Q. What is your occupation?

A. Controller, Granat Bros.

Q. That is the plaintiff in this action?

A. That is right.

Q. Are you familiar with the business details with regard to the financial end of Granat Bros.?

A. Yes, sir.

Q. Will you tell us, please, the average profit which Granat Bros. make on ring ensembles of the latching type in their store, and tell us how you arrived at those figures?

A. It is difficult to break that down in our various departments due to our method of operating. I can give you an example. Suppose our sales are 100 percent. Our gross profit is 45 percent, our cost of running our retail business is 37 percent, which would then leave us approximately 8 percent.

Q. Would you say it was a fair statement to make that on the sales of diamond ensemble rings of the latching type that the [94] Granat Bros. would normally make at least a net profit of approximately 8 percent? A. I think so.

Mr. Mellin: That is all.

(Testimony of Forrest R. Quick.)

Cross-Examination

Q. (By Mr. Trabucco): There are several different types of ring ensembles being manufactured by Granat Bros., is that so?

A. That is true.

Q. And there are various types of ring ensembles having different types of mechanical locking means, is that not true? A. That is true.

Mr. Mellin: That concludes the defendants' case, your Honor.

Mr. Trabucco: I would like to call Mr. Gomez.

RALPH D. GOMEZ

recalled as a witness in rebuttal, and having been previously duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Trabucco): Have you examined the September publication of "Jewelers' Circular Keystone," a catalog? A. Yes, I have.

Q. Will you point out the various types of ring ensembles having mechanical connecting means between which are illustrated in this catalog?

Mr. Mellin: If your Honor please, I must object to this [95] testimony as unnecessarily encumbering the record, because unless there is a foundation laid that the rings shown in that catalog were manufactured or that that catalog ante-

(Testimony of Ralph D. Gomez.)

dates the patent, which is the year 1935, it is immaterial, because how can they anticipate a patent by a catalog of 1948?

Mr. Trabucco: There isn't any contention here as to the catalog anticipating the patent in suit.

Mr. Melin: Then it is immaterial.

Mr. Trabucco: The purpose of this exhibit is to show that at the present time any ring ensembles having mechanical locking features which not necessarily are manufactured in accordance with the patent in suit, but this exhibit does indicate that there are a large number of such rings being sold, and that the Granat Bros. has not the exclusive mark on such types of rings. It goes to show that the commercial success of the defendant is not such as has been represented here.

Mr. Mellin: The testimony is, your Honor, that up until approximately early this year, 1948, as Mr. Wineroth testified, there appeared other ring ensembles. Up until that time they had the exclusive field. I do not see how any excuse can be made for infringement by the use of the patent here in suit or what material bearing it has on the matter if there are others infringing at this late date, fourteen years after the application for the patent. It is immaterial. It has no bearing on any issue of whether the patent is valid or invalid, and [96] we have freely admitted other rings have appeared, but the fact that there may have been other infringers or other structures does not

(Testimony of Ralph D. Gomez.)

seem to have any bearing on whether this patent is valid.

The Court: I do not see the materiality as to the validity of the patent.

Mr. Trabucco: No, it does to the commercial success.

The Court: Even granted it would go to the question of the commercial success. It does not negate the claim of the defendant that they had commercial success with those rings. Maybe a lot of other people have been successful, too, but how does that affect the matter?

Mr. Trabucco: It lessens the efficacy of such testimony, I would say.

The Court: I do not think so. You may have that marked for identification to have the record clear as to what you have offered.

Mr. Trabucco: I will ask that it be marked for identification.

(The catalog referred to was thereupon marked Plaintiff's Exhibit 5 for Identification.)

Mr. Mellin: The plaintiff rests?

Mr. Trabucco: Yes.

Mr. Mellin: So does the defendant, your Honor.

The Court: What is your pleasure, gentlemen, about submitting the matter? [97]

(Discussion with reference to submission.)

The Court: Would you gentlemen come out here Tuesday at 9:30?

Mr. Trabucco: Yes, your Honor.

The Court: Would that be agreeable?

Mr. Mellin: Yes. What time are you allotting, your Honor?

The Court: I have a case set for ten o'clock but we will postpone that. Suppose we allow an hour to both sides. Would that be sufficient? I mean half an hour apiece.

Mr. Mellin: I think that would be all right.

Mr. Trabucco: I should think that a half hour would be plenty.

(The matter was continued until Tuesday, November 16, 1948, at 9:30 o'clock a.m.)

[Endorsed]: Filed Nov. 16, 1948. [98]

[Endorsed]: No. 12160. United States Court of Appeals for the Ninth Circuit. Ralph D. Gomez and William Henderson, as individuals and co-partners doing business under the name of Gomez Manufacturing Company, Appellants, vs. Granat Bros., a corporation and Joseph Granat, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 20, 1949.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12160

**RALPH D. GOMEZ and WILLIAM HENDER-
SON, Co-Partners Doing Business Under the
Name and Style of Gomez Manufacturing Com-
pany,**

Plaintiffs,

vs.

**GRANAT BROS., a Corporation, and JOSEPH
GRANAT,**

Defendants.

and

GRANAT BROS., a Corporation,

Cross Plaintiff,

vs.

**RALPH D. GOMEZ and WILLIAM HENDER-
SON, As Individuals and Co-Partners, Doing
Business Under the Name and Style of Gomez
Manufacturing Company,**

Cross Defendants.

**STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL—AND DESIGNATION OF PARTS
OF RECORD FOR PRINTING.**

Now comes the above named appellants, and through their counsel, specify that they desire to adopt as their points on appeal, the Statement of Point Relied Upon, appearing in the Transcript of the Record.

It is also stated that appellants desire the record as certified to be printed in its entirety save for

those items in the Designation of Contents of Record on Appeal which were specified as physical exhibits, and excepting also that portion of the Transcript of the evidence and proceedings before Judge Louis E. Goodman on November 12, 1948, commencing with line 9 of page 36, and ending with line 24 of page 37.

/s/ J. E. TRABUCCO

Attorney for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 21, 1949.

[Title of U. S. Court of Appeals and Cause.]

ORDER

To the United States Circuit Court of Appeals,
for the Ninth Circuit:

For the purpose of avoiding unnecessary costs, it is respectfully requested that the original exhibits in the above entitled case be considered in their original form without being reproduced.

So Ordered:

/s/ WILLIAM DENMAN

/s/ CLIFTON MATHEWS

/s/ WILLIAM HEALY

U. S. Circuit Judges.

Respectfully submitted,

/s/ J. E. TRABUCCO,

Attorney for Appellants.

[Endorsed]: Filed January 21, 1949. Paul P. O'Brien, Clerk.

No. 12,160

IN THE
United States Court of Appeals
For the Ninth Circuit

RALPH D. GOMEZ and WILLIAM HENDER-
SON, as individuals and co-partners
doing business under the name of
Gomez Manufacturing Company,

Appellants,

vs.

GRANAT BROS., a corporation, and JOSEPH
GRANAT,

Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

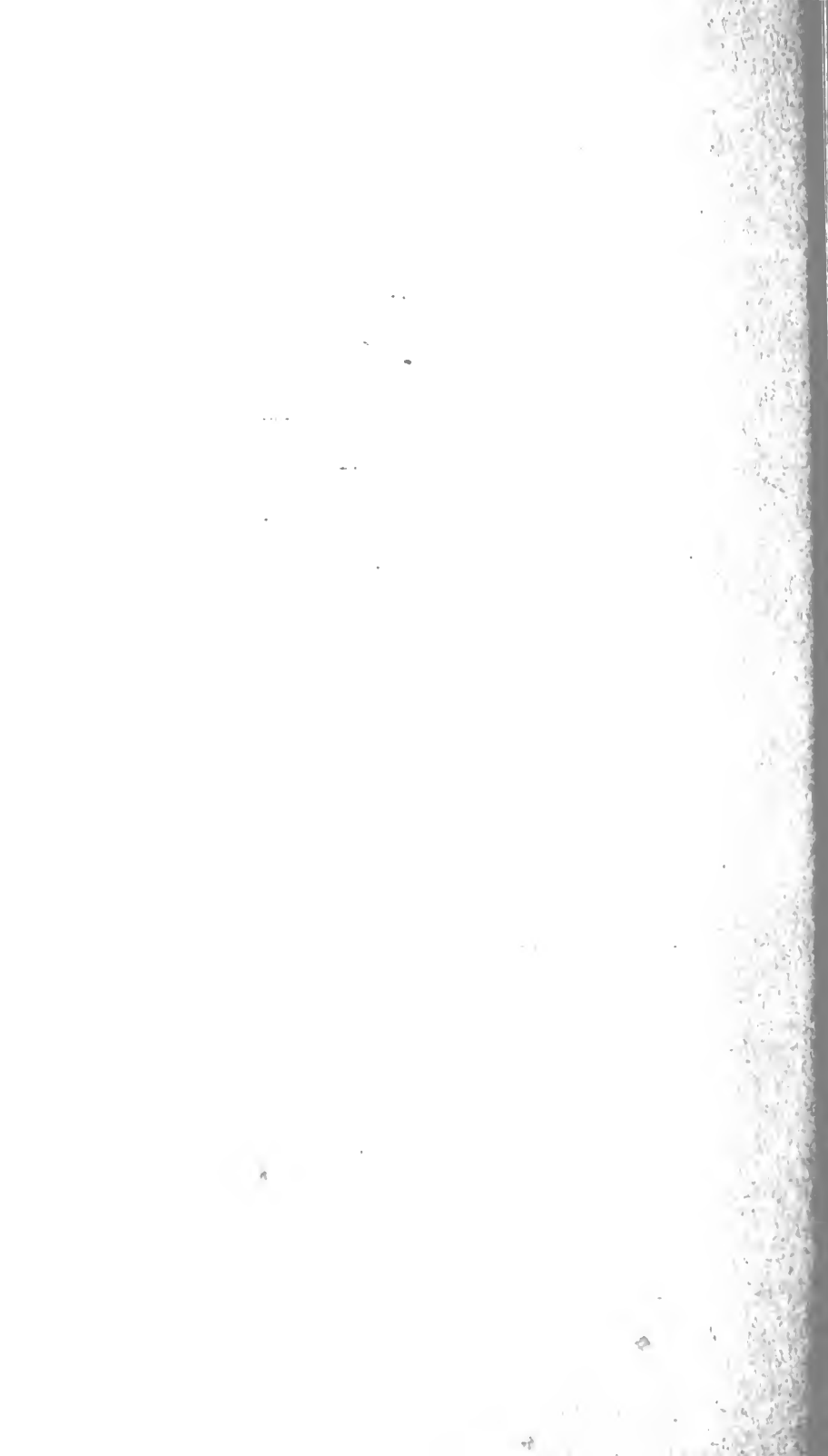
J. E. TRABUCCO,

Russ Building, San Francisco 4, California,

Attorney for Appellants.

FILED

MAR 24 1949



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No. 12,160

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RALPH D. GOMEZ and WILLIAM HENDER-
SON, as individuals and co-partners
doing business under the name of
Gomez Manufacturing Company,

Appellants,

VS.

GRANAT BROS., a corporation, and JOSEPH
GRANAT,

Appellees.

**Appeal from the United States District Court for the
Northern District of California, Southern Division.**

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This action was originally commenced by plaintiffs-appellants under Sec. 274d of the Judicial Code, 28 U. S. C. A. § 400 for a declaratory judgment establishing the invalidity of the Granat Patent No. 2,059,228. The complaint alleged that the patent in

(NOTE): All italics supplied unless otherwise specified.

suit was invalid; that threatening letters charging infringement sent by defendants-appellees to customers of plaintiffs-appellants had resulted in considerable loss of business; and that if the threats of suit were allowed to continue irreparable damage would result to plaintiffs-appellants and to their customers. A cross-complaint charging infringement of the afore-said patent in suit was subsequently filed in this action. Prior to the trial a written stipulation (R. p. 25) was duly filed wherein it was agreed that an actual controversy existed. The court below dismissed the complaint, found that the patent in suit was valid and infringed, and issued an injunction restraining plaintiffs-appellants from manufacturing and selling infringing finger ring ensembles.

The findings of fact and conclusions of law adopted by the court are found at pages 29 to 36 of the printed record. No briefs were presented after the trial and no opinion was filed by the court below, but the findings of fact and conclusions of law entered herein indicate that the court found with appellees on all of the allegations of the cross-complaint as well with respect to all of their contentions made at the trial.

Appellants in their *Statement of Points Relied Upon* (R. p. 47) challenge the correctness of Findings Nos. 4, 5, 8, 12, 13, 14, 15, 16, 17, 18, 21, 22 and 23 and Conclusions of Law Nos. 2, 3, 4, 5, 6, 7, 8, 9 and 10.

Briefly stated the errors to be corrected by the appeal are:

1. The dismissal of the complaint.
2. The entry of a decree in favor of appellees.
3. The granting of an injunction against appellants.
4. Sustaining the validity of the patent in suit.
5. Awarding damages to appellees in an amount equal to eight per cent (8%) of the retail sales price of the alleged infringing rings manufactured and sold by appellants.
6. Awarding costs and attorney's fees to appellees.

The main issue to be decided by this appeal is whether the patent in suit is valid.

THE PATENT IN SUIT.

The patent in suit relates to a mechanically locked finger ring ensemble comprising an engagement ring and a wedding ring together with interconnecting means embodying a recess in the side of one of the rings within which lug or projection on the side of the other ring detachably fits.

The four claims of the patent in suit are substantially of the same scope except that claim 3 includes a stop associated with the recess of one ring for preventing the lug of the other ring from being re-

moved from the said recess except in a direction toward the two rings.

The claims are as follows:

1. In a ring ensemble, the combination of an engagement ring and a wedding ring, said engagement ring having an undercut recess formed in one side thereof, said wedding ring having a lug formed on one side thereof, said lug having the same configuration as said recess, whereby when said lug is inserted in said recess said rings will be locked together against axial rotation with relation to each other.

2. In a device of the character described, the combination of an engagement ring having a mounting formed thereon, and a wedding ring having a mounting formed thereon, said engagement ring having a recess formed in the side of said mounting, said recess having its bottom opening formed toward the axis of said ring, said recess being further provided with dove-tailed ends, said wedding ring having a lug formed thereon, said lug having the same configuration as said recess and capable of entirely filling said recess when said rings are side by side and in axial alignment.

3. In a device of the character described, the combination of a wedding ring and an engagement ring, each of said rings having a mounting formed thereon, locking means interposed between said rings, said locking means including a recess formed in one of said rings, and a lug formed upon the other of said rings, said recess and said lug having the same area, the upper

end of said recess forming a stop for said lug, whereby said lug may be removed from said recess only in a direction toward the axis of said rings.

4. A jewelry set comprising, in combination, two rings, one of said rings having a mortise on the side thereof, said mortise being open at one end thereof and the second ring having a tenon on the side thereof which fits into said mortise for holding the two rings against relative displacement on the wearer's finger, said tenon being projected into said mortise by a relative movement of said rings in a plane substantially parallel to the sides of the rings.

It is to be noted that the mechanical means recited in claims 1, 2 and 3 for detachably securing the two finger rings of the ensemble together comprises an undercut recess on the side of one ring and a lug of the same configuration on a side of the other ring. In claim 4 this same connecting means is defined as a tenon on the side of one ring fitting in a mortise in the side of the other ring. A commonly used term for an undercut recess and an engaging lug of the same configuration is "a dovetail connection." A "mortise and tenon connection" in so far as this discussion is concerned comprises a similar combination.

A "dovetail connection or joint" is sufficiently well known to be defined in dictionaries. In *Webster's New International Dictionary* at page 777 the definition is given as follows:

“Dovetail joint—a flaring tenon or tongue and a mortise or socket into which it fits, making an interlocking joint between the pieces which resist pulling apart in all directions except one.”

It is to be noted that what the patentee Granat uses to connect his two rings together is a “dovetail” joint or connection.

APPELLANTS' RING ENSEMBLE

Appellants have been manufacturing ring ensembles of the type embodying a wedding ring and an unattached engagement ring since about 1938, but only since the early part of 1948 have they been making locked ring ensembles. (R. p. 124). Explaining how in 1948 he commenced the manufacture of a mechanically locked ring ensemble, Mr. Gomez testified (R. p. 129) that because of the trend in the jewelry business to have the wedding and the engagement rings locked together, he changed the construction of the two unattached rings of the ensemble he was then manufacturing (see sketch, defendants' exhibit H) by providing an indentation in the side of one ring and a projection in the side of the other ring (Defendants' exhibit I). Mr. Gomez testified positively that he had never seen the Granat Bros. ring ensemble having a mechanical locking feature. (R. p. 126, 139), until after he had commenced the manufacture and sale of his locked ring combination. Attention is directed to the foregoing, not because it tends to prove or disprove any of the

issues in this case, but because of the inference made at the trial that Mr. Gomez might have adopted the type of inter-connecting means embodied in appellants' ring ensemble after having seen that made and sold by Granat Bros. As a matter of fact appellees have manufactured several types of ring ensembles and have advertised them rather extensively but, as indicated in defendants' exhibit D, the advertisements show no particular type of connecting means for the illustrated rings nor do they have any patent numbers displayed in connection with the illustrations.

Admittedly, the ring ensemble manufactured by appellants comes within the scope of the patent in suit, but it is contended that all of said claims are invalid.

ARGUMENT.

THE PRIOR ART.

The art cited by the Patent Office was woefully meager, and practically all of the prior art which should have been considered during the prosecution of the patent application was overlooked. The only prior art citation was the Harris patent No. 2,000,228. (File History of Granat Patent in suit.)

The lower court's finding (Finding of Fact No. 17) that the prior art before the Patent Office was the most pertinent prior art on the subject of the patent in suit is in error.

It is to be noted that the Harris patent, while disclosing the combination of an engagement ring and a

wedding ring held in locked relationship, did not show the well-known dovetail tongue and groove connecting means of the patent in suit.

Other pertinent prior art not cited or considered during the prosecution of the patent application is as follows:

Kelly	152,233
Kaas	424,211
Bullard	464,749
Linderman	517,348
Grierson	959,854
Atkinson	942,047
Tschirgi	1,482,772
Thomas	1,536,540
Beaujard	1,712,417
Hubbard	1,715,293
Mittleburg	1,829,366
Birnbaum	1,877,750

It will be noted that Kaas, Bullard, Thomas and Beaujard disclose ring ensembles comprising two finger rings arranged in interlocked relationship, while the other patents listed above show dovetail tongue and groove or mortise and tenon connecting means to have been commonly used in various arts to secure two elements together. In fact the use of dovetail tongue and groove, or mortise and tenon connecting means is notoriously old and for centuries such a connecting means has been commonly used by mechanics, jewelers, cabinet makers, builders, carpenters, plumbers and various other artisans. (R. pp. 77, 78.)

As far back as 1890 it was old to attach two rings together to provide an interlocked ring ensemble (Kaas patent No. 424,211), and in 1891 the securing of two finger rings together by tenon and mortise means was patented (Bullard patent No. 464,749). In 1925 a mortise in the side of one ring and a tenon on the side of another ring were used to secure the two rings together (Thomas patent No. 1,536,540). It is therefore the contention of appellants that the Granat patent in suit is fully anticipated by the prior art and is therefore invalid. It is readily apparent that the patentee, Granat, merely took the interlocked ring combination shown in such patents as Kaas, Bullard and Thomas and substituted for the type of connection shown in said patents, the well-known dovetail tongue and groove or mortise and tenon connecting means commonly used in various arts and more particularly disclosed in Kelly, Tschirgi, Hubbard, Atkinson, Mittleburg and various other patents. It is to be noted that in Kaas, Bullard and Thomas the two rings of the ensemble are held against independent rotation and relative displacement by the connecting means which joins them together (R. p. 77). The connecting means of the patent in suit operates in the identical same manner.

THE PATENT IN SUIT IS NOT PRESUMED TO BE VALID.

Generally speaking, a patent is presumed to be valid when it is issued by the patent office. This presumption does not follow the issuance of a patent,

however, when pertinent prior art is not cited or considered by the patent office during the prosecution of the patent application.

In the present case it is to be noted that the patent office overlooked practically all of the pertinent prior art. The only prior art cited by the examiner was the Harris patent, which in view of the filing date of one month prior to that of Granat could have been readily eliminated as a reference. There were many patents overlooked such as Kaas, Bullard, Thomas and others disclosing interlocking finger ring ensembles, and entirely ignored was the extensive prior art showing the commonly used tenon and mortise or dovetail tongue and groove connection.

In the Ninth Circuit case of *Stoody Co. v. Mills Alloys*, 67 F. (2d) 807, 810 the law with respect to the presumption as to the validity of a patent when pertinent prior art is not considered during the prosecution of the application, is given as follows:

“We do not agree with the contention, the fact that the file wrapper disclosed the patent to have been granted as first applied for without any references, adds any force to the presumption of validity arising from the grant. On the contrary we think the force of that presumption is much diminished, if not destroyed, by the lack of any reference by the examiner to the Clark patents. It does not seem likely that the expert examiner would pass them by without notice or consideration if they had been called to his attention. We feel compelled, therefore, to the conclusion, that

the 1st and 5th claims of the patent in suit are invalid for want of patentable novelty.”

In a more recent Ninth Circuit case, *Metler v. Peabody Engineering Corp.*, 77 F. (2d) 56, 58 the rule controlling here is given as follows:

“The presumption of validity which attends the issuance of letters patent by the Patent Office is overcome in this case by the clear evidence of anticipation in the prior art which was not cited or considered by the Patent Office when the application for appellant’s patent was passed on.”

Also to the same effect are the following:

France Mfg. Co. v. Jefferson Electric Co., 6 C.C.A. 106 F. (2d) 605:

“The usual presumption of validity arising from the granting of the patent in suit is weakened when the Patent Office did not have its attention directed to the most pertinent art.”

Sieberling Rubber Co. v. I. T. S. Co., 6 C.C.A. 134 F. (2d) 871, 873:

“When the validity of a patent is challenged it becomes the duty of the Court to ascertain just what it was that the patentee did that was not done before, and whether it denoted invention or whether it was within the expected routine skill of those laboring in the art.”

McClintock v. Gleason et al., 9th C.C.A. 94 F. (2d) 115, 116:

“The strong presumption of validity arising from the granting of a patent is weakened when it ap-

pears that the patent is granted without reference to pertinent art."

O'Leary v. Liggett Drug Co., 150 F. (2d) 656:

"The issuance of a patent creates no presumption of validity sufficient to overcome a pertinent prior art reference which has not been considered in the Patent Office."

Conclusions of law 2 and 3 are therefore in error.

THE PATENT IN SUIT IS INVALID.

The patent in suit is invalid for three reasons:

(a) Because the prior art fully anticipates the purported Granat invention;

(b) Because the patent claims are fatally defective in that they define an exhausted and old combination consisting of two connected finger rings together with a certain kind of connecting means, namely a dovetail tongue and groove or mortise and tenon connection, the invention if any residing in the connecting means per se; and

(c) Because the combination of the patent in suit does not constitute invention.

**(a) THE PATENT IN SUIT IS ANTICIPATED BY
THE PRIOR ART.**

It is quite obvious that the prior art, and particularly Kaas, Bullard, Thomas, Beaujard and Harris,

anticipate the combination of two finger rings held together in interlocked relationship. Taking the old *Thomas patent* for example, it is to be noted that two finger rings 12 and 14 are detachably held in interlocked relationship by means consisting of a key or projection 16 on the side of one ring extending through a key hole or recess in the side of the other ring. To employ the well-known and commonly used dovetail tongue and groove or mortise and tenon connection disclosed in Kelly, Atkinson, Tschirgi, Hubbard, Grierson, Birnbaum, Mittleburg and Linderman, to connect the rings 12 and 14 of Thomas together would certainly not amount to invention.

In the *Kaas patent* substantially the same type of connecting means as that used by Granat, is employed to hold the two rings B and C in interlocked relationship. It will be noted that the ring B is provided with a crown having a slotted side opening F which is adapted to receive the crown portion G of the ring C. This structure is practically identical in operation and construction to the Granat ring ensemble. The only difference is that the mortise on the side of Granat's engagement ring is adapted to receive a lug carried by the wedding ring, while in Kaas the mortise F on the ring B is adapted to receive the crown portion of the ring C. Such a slight change in the shape of the Kaas device obviously does not amount to invention.

In the *Bullard patent* we see another adaptation of the mortise and tenon type of connecting means. There the ring O is provided with a recess O' in its

crown while the other ring of the ensemble is formed with a lug or tenon *r* which projects into the recess *O'* to secure the two rings in interlocked relationship. It is interesting to note that the definition given in claim 3 of this patent reads directly on the Granat ring ensemble.

The locked ring ensembles of the prior art with the exception of Beaujard are provided with connecting means which prevents the relative independent rotation of either ring as well as their detachment one from another when worn on a finger.

In analyzing the claims of the patent in suit it is apparent that claims 1, 2 and 4 are substantially the same in that they each define a combination of two rings together with a connecting means of the mortise and tenon or dovetail tongue and groove type. It is to be noted that the expressions "mortise and tenon", and "dovetail tongue and groove" are considered here as synonymous terms, used interchangeably. For instance in the Atkinson patent, page 2, lines 1-23, this type of connection is referred to as being "dove-tailed" and is described in the manner of claims 1 and 2 of the patent in suit as comprising an "undercut flange" and an "undercut cavity". In Grierson, lines 50-55, the connection is referred to as comprising a "dovetail slot" and a "dovetail lug". In Hubbard the connection is described "dovetail groove" and "dove-tail rib." In Kelly and Linderman the connection is referred to as comprising a "dovetail tongue" and a "dovetail groove." In Tschirgi the connection is described as consisting of a "tenon and mortise", as

defined by Claim 4 of the patent in suit. Bullard also refers to his connecting means as comprising a "tenon" and a "recess". It therefore is to be noted that the expressions in the claims of the patent in suit describing the means connecting the two rings of the ensemble are identical in meaning.

Claim 3 of the patent in suit includes the same type of connecting means but it also has an element not found in the other three claims, namely a "stop for the lug". This stop is intended to prevent the removal of the lug from the recess only when one ring is shifted in a direction of the axes of the rings. A "stop" is commonly used to prevent one element from moving beyond a certain point with respect to another element of a combination. It certainly is not inventive to provide a stop on one ring to prevent movement of the other ring except in a certain direction. In the prior art this expedient is shown in Atkinson at B'', in Grierson at B3, and also in Bullard in Kaas at points where one ring abuts the shank or flange of the other.

Upon reading the following decisions which are in point here it will be appreciated that the Granat ring ensemble is absolutely devoid of invention, and that whatever slight change was made in the prior art teachings was but a minor adaptation such as that to be expected by one skilled in the art. Using the well-known dovetail tongue and groove connection to hold two rings in interlocked relationship is not inventive under the controlling authorities.

The fairly recent Supreme Court case of *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U. S. 84; 86 L. Ed. 58, is now widely recognized as a leading authority on the question of invention. The Mead patent there involved in the controversy concerned an automobile lighter embodying a cordless heating element having a thermostat for discontinuing the flow of electrical energy to the said element when the latter had reached a certain temperature. Prior to the Mead invention heating elements were commonly used and so were thermostats, but the application of a thermostat to a cordless heating element was not known before Mead's invention. However, the Supreme Court in conceding that the functions performed by Mead's combination were new and useful, ruled that they did not constitute invention or discovery. The court stated (pages 90-92 of 314 U. S.):

“We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute 35 U.S.C. sect. 31, R.S. 4886, the device must not only be ‘new and useful’, it must be ‘invention’ or ‘discovery’. *Thompson v. Boisselier*, 114 U.S. 1; 29 L. Ed. 76. Since *Hotchkiss v. Greenwood*, 11 How. 248, 267; 13 L. Ed. 683, decided in 1851 it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art. *Hicks v. Kelsey*, 18 Wall. 670; 21 L. Ed. 852; *Slawson v. Grand Street R. Co.*, 107 U. S. 649; *Saranac Automatic Machine Corp. v. Wirebounds Patents Co.*, 282 U. S. 704; 75 L.

Ed. 643; *Honolulu Oil Corp. v. Halliburton*, 306 U. S. 550; 83 L. Ed. 980. The principle of the *Hotchkiss* case applies to the adaptation or combination of old or well known devices for new uses. *Phillips v. Detroit*, 111 U. S. 604, 28 L. Ed. 532; *Concrete Appliances Co. v. Gomery*, 269 U. S. 177; 70 L. Ed. 222; *Powers-Kennedy Contracting Corp. v. Concrete Mixing & Conveying Co.*, 282 U. S. 175; 75 L. Ed. 278; *Electric Cable Joint Co. v. Brooklyn Edison Co.*, 292 U. S. 69; 78 L. Ed. 1131; *Altoon Publix Theatres Inc. v. American Tri-Ergon Corp.*, 294 U. S. 477, 79 L. Ed. 1005; *Textile Machine Works v. Hirsch Textile Machines Inc.*, 302 U. S. 490; 82 L. Ed. 382; *Toledo Pressed Steel Co. v. Standard Parts Inc.*, 307 U. S. 350; 83 L. Ed. 1334. That is to say the new device, however useful it may be, must reveal the flash of creative genius, not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain.

“Tested by that principle Mead’s device was not patentable. We cannot conclude that his skill in making this contribution reached the level of inventive genius which the Constitution, Art. I, Sec. 8, authorizes Congress to reward. He merely incorporated the well known thermostat into an old wireless lighter to produce a more efficient, useful and convenient article. A new application of an old device may not be patented. The result claimed as new is the same in character as the original result. *Blake v. San Francisco*, 113 U. S. 679, 683; 28 L. Ed. 1070, even though the new result had not been contemplated. *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 494; 28 L. Ed. 222 and cases cited.

Certainly the use of a thermostat to break a circuit in a 'wireless' cigar lighter is analogous to or the same in character as the use of such a device in electric heaters, toasters, irons whatever might be the difference in detail of design. Ingenuity was required to effect the adaptation, but no more than that to be expected of a mechanic skilled in the art."

In *Blake v. City and County of San Francisco*, 113 U. S. 679, 28 L. Ed. 1070 it was held that it was not inventive to apply a relief valve to a steam fire engine when such a relief valve had been previously used on steam ships. The court stated at page 683:

"The application of a valve to a similar use on land was not a new combination or a new invention."

In *Pennsylvania R. Co. v. Locomotive Truck Co.*, 110 U. S. 490, 499; 28 L. Ed. 222, 225, the court said:

"The mere application of an old contrivance in an old way to an analogous purpose without novelty to the mode of applying such old contrivance in the new purpose is not a valid subject matter of a patent."

In *Paramount Pictures Corporation v. American Tri-Ergon Corporation*, 294 U. S. 463, 473; 79 L. Ed. 997, 1002, the court stated:

"The application of an old process to a new and closely analogous subject, plainly indicated by the prior art as an appropriate subject of the process is not invention."

In *Dreyfus v. Searle*, 124 U. S. 60, 64, the rule is stated as follows:

“There is no patentable invention in applying to the heating of wine or any other liquid, from the inside of the cask, the apparatus which had been previously used to heat another liquid in the same manner.”

In *Concrete Appliances Co. v. Gomery*, 269 U. S. 175, 185; 70 L. Ed. 222, 226, one of the leading cases on this subject, the rule is given as follows:

“The adaptation of * * * familiar Appliances to the movement and distribution of wet concrete * * * are persuasive evidence that this use in combination with well known mechanical elements was the product only of ordinary mechanical skill and not of inventive genius.”

In the more recent and particularly pertinent case of *Dow Chemical Co. v. Halliburton Co.*, 324 U. S. 319, 328; 89 L. Ed. 973, 980, the court said:

“He who is merely the first to utilize the existing fund of public knowledge for new and obvious purposes must be satisfied with whatever fame, personal satisfaction or commercial success he may be able to achieve. Patent monopolies, with all their significant economic and social monopolies, are not reserved for those who contribute so insubstantially to that fund of public knowledge.”

In the case of *Textile Machine Works v. Hirsch T. Machines*, 302 U. S. 489, 497; 82 L. Ed. 382, 387, the court stated:

“The addition of a new and useful element to an old combination may be patentable, but the addition must be the result of invention rather than the mere exercise of the skill of the calling and not one indicated by the prior art.”

The old case of *Hotchkiss v. Greenwood*, 11 How. 248; 13 L. Ed. 683, decided in 1851, is frequently referred to at the present time in patent suits, and in connection with the case at bar it is directly in point. There the invention covered by the patent in suit concerned the making of a door knob of clay and attaching it to a metal shank by a dovetail connection. The clay knob and the shank to which it was connected were both well known in the art, but the patentee contended that in combination with the peculiar type of connecting means the shank and knob involved patentable novelty. In declaring the patent invalid the court stated:

“But in the case before us the knob is not new, nor the metallic shank and spindle, nor the dovetail form of the cavity in the knob, nor the means by which the metallic shank is fastened therein. All these were well known and in common use. * * * Unless more ingenuity and skill in applying the old method of fastening the shank and the knob were required in the application of it to the clay or porcelain than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements, of every invention. In other words the improvement is the work of the skillful mechanic, not that of the inventor.”

In *Koochook Co. v. Barrett*, 158 F. (2d) 463, 466, 467 (8th C.C.A.), the court stated:

“We think that Barrett’s contribution cannot be held to constitute invention in the light of *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U. S. 84, * * * the substitution by Barrett of a rotary type disc grinder for a cylindrical grinder or a grinder of the cone or rasp type used in tools similar to Barrett’s did not rise to the dignity of invention, and it is to be attributed to the mechanical skill of one versed in the art. Surely a skilled mechanic ordinarily should be capable of selecting from an assortment of abrasive tools of his trade the one best fitted to do the work at hand.”

In *Hannah M. Smith v. Springdale Amusement Park*, 283 U. S. 121, 123, 75 L. Ed. 878, 879, Justice Hughes stated the rule applicable here as follows:

“We agree with the Circuit Court of Appeals that the particular sort of spring support and the wire mesh partitions partially covered with fabric, as well as the other elements, are but forms of construction within the range of ordinary mechanical skill. There was an utter absence of invention justifying the issuance of this patent.”

In *Miller v. Foree*, 116 U. S. 22, 29 L. Ed. 552, 553, the patent in suit concerned the manufacture of plug tobacco with letters impressed therein. The prior art showed it old to make impressions in soap cakes, sealing wax, chocolate bars and butter. The court said, in holding the patent in suit invalid:

“The application of an old process or machine to a similar or analogous subject with no change in the manner of applying it and no result substantially distinct in its nature, will not sustain a patent, even if the new form or result has not been contemplated.”

In *McIvor v. Chemurgic Corporation*, 104 F. (2d) 58, (9th C.C.A.), this Court, in holding the patent in suit invalid, stated:

“The addition of a new and useful element to an old combination may be patentable; but the addition must be the result of invention rather than the mere exercise of the skill of the calling, and one not plainly indicated by the prior art.”

THE DOVETAIL TONGUE AND GROOVE CONNECTION BEING A COMMONLY USED EXPEDIENT CANNOT GIVE PATENTABLE NOVELTY TO GRANAT'S RING ENSEMBLE.

The prior art showing the use of dovetail tongue and groove connections for joining two members together is quite extensive. In fact this well known expedient is commonly used in various arts, as shown by the several representative patents in evidence here. The testimony of plaintiffs' expert witness (R. pp. 78, 79) further shows this type of connection to be commonly used by artisans in many arts. The authorities, herein-after listed, clearly indicate that a commonly known expedient when transplanted from one art to another does not make an old combination patentable, even though it had not been previously used in the particular art to which it has been transferred. In the case

at bar, the patentee Granat, merely adopted the well known dovetail tongue and groove connecting means found extensively in the prior art, as a means for detachably securing two finger rings together. The combination of the two finger rings joined together is not patentable since Thomas, Kaas, Bullard and other prior patents clearly show this arrangement to be old. Neither is the dovetail tongue and groove or mortise and tenon type of connecting means new, since such patents as Kelly, Tschirgi, Hubbard, Mittleburg, Grierson, Atkinson and Linderman clearly indicate that this is an old and commonly used expedient in the connecting of two elements together. These latter patents are pertinent here in view of the principles set forth in the following decisions.

The U. S. Supreme Court case of *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 491, 44 L. Ed. 856, 859, is a leading case on this subject, and its doctrine has been followed in all of our courts including the Ninth Circuit Court of Appeals. In this case the Martin patent in suit related to an improvement in a windmill and the patentable novelty was alleged to have resided in an external toothed pinion in association with an internal toothed spur wheel. The prior art showed this combination to be old, well known and commonly used in various types of machinery including harvesters, churns, and sewing machines. The following quotation is quite lengthy because of its pertinency here:

“In the present case, however, not only are there a large number of patents shown containing this

combination (the pitman actuated by two eccentric external toothed gears) but several in which the combination is used for different purposes than in the construction of windmills * * *. The case then reduces itself to this: The Martin combination had previously been used in a large number of mechanical contrivances for the purpose of converting a rotary into a reciprocating motion. * * * Having all these devices before him (the patentee), he is chargeable with the knowledge of all pre-existing devices, did it involve an exercise of inventive faculty to apply this same combination to a windmill for the purpose of converting a rotary into a reciprocating motion? We are of the opinion that it did not. The main advantage derived from it arose from the engagement of a large number of teeth in each wheel. This peculiarity, however, inured to the advantage of every machine in which the combination was used for the purpose of converting motion * * * *Martin therefore discovered no new function, and he credited no new situation, except in the limited sense that he first applied an internal gearing to the old Mast-Foos mill which was practically identical with the Martin patent except in the use of internal gearing. He invented no new device. He used it for no new purpose. He applied it to no new machine. All he did was to adapt it to a new purpose in a machine where it had not been used for that purpose. The result may have added to the efficiency and popularity of the earlier device although to what extent is open to serious doubt. In our opinion this transfer does not arise to the dignity of invention."*

In *Peveley Dairy Co. v. Borden Printing Co.*, 123 F. (2d) 17, 19, Ninth Circuit Court of Appeals, this court stated the rule applicable here as follows:

“It is well settled that mere application of an old device to a new use does not constitute invention.”

In *John Bean Mfg. Co. v. Creagmile*, 123 F. (2d) 182, 185, Ninth Circuit Court of Appeals, this court in holding the patent in suit invalid followed the rule of the *Mast, Foos* case and stated:

“Mere application of a mechanical equivalent to another use is not invention.”

In *Vandenburg v. Truscon Steel Co.*, 261 U. S. 6, 15, 67 L. Ed. 506, 512, the patent in suit related to concrete reenforcing in which a kerf and an integral spur were used to clamp and hold a spiral rod. The kerf and spur were new in the concrete reenforcing art but were old in the metal working art. The Supreme Court in declaring the patent invalid stated:

“It is true that in the field of reenforcing concrete the kerf and spur had not been used before as Vandenburg used it, but the kerf and spur were old in the art of kindred fields. They were old in the metal working art. Exactly the equivalent is shown in sand screens for mixing the materials of concrete and in sustaining fence wires. * * * It does not seem to us that it involved real invention merely to add a spur or clamp, or to peen or hammer down the edges of the kerf to fix the spiral rod firmly. We find therefore the claims without merit as involving invention.”

Particularly in point here for the reasoning behind the rule, is the case of *Old Town Ribbon & Carbon Co. v. Columbia R. & C. Mfg. Co.*, 159 F. (2d) 379, 382. Judge L. Hand's opinion is as follows:

“The constitution (Art. I, Sect. 8) gives Congress power to grant unlimited monopolies for ‘discoveries’ and there is no antecedent reason for saying that Congress might not if it choose, issue a patent for a new use of an old physical object, which is in fact closely akin to, if not identical with an ‘art’, like a process. There would be nothing unreasonable in so doing; substantially no ‘machine’, ‘manufacture or composition of matter is ever new throughout’, usually it is a combination of elements, all of which are severally old, and the invention consists in the mental act of fabricating the combination. Nevertheless since 1793 unless a patent disclosed a new and useful art, a new ‘machine’, a new ‘manufacture’, or a new ‘composition of matter’ it has not been a valid patent. If it be merely for a new employment of some ‘machine, manufacture, or composition of matter’ already known, it makes not the slightest difference how beneficial to the public the new function may be, how long a search it may end, how many should have shared that search, or how high a reach of imaginative ingenuity the solution may have demanded. All the mental factors which determine invention may have been present to the highest degree, but it will not be patentable because it will not be within the terms of the statute. *This is the doctrine that a new ‘use’ can never be patentable.* In this circuit we have many times applied it and it has been recognized elsewhere.
* * * The act of selection out of which the new

structure arises, is the determinant, and small departures may signify and employ revolutionary changes in discovery; *but the law does not protect the act of selection per se, however meritorious, when it is not incorporated into some new physical object.*”

The same principle is followed in *Altoona v. American et al.*, 294 U. S. 477, 79 L. Ed. 483, wherein the court stated:

“The inclusion of a fly wheel in any form of mechanism to secure uniformity of its motion has so long been standard procedure in the field of mechanisms and machine design that the use of it in the manner claimed by the present patent involved no more than the skill of the calling. * * * The patentees brought together old elements, in a mechanism involving no new principle, to produce an old result, greater uniformity of motion. However skillfully this was done * * * it still was the product of skill not invention.”

In *Barry v. Studebaker Corp.*, 113 F. (2d) 400, 402, it was held that the use of commonly used flanging as means for connecting two elements together was not patentable. The court stated:

“The use of flanging in the art of metal working is old and there is no novelty in the use of flanges for the purpose of joining or combining complementary members to form hollow metal structures.”

The case of *Friend v. Burnham & Morrill Co.*, 55 F. (2d) 150, 151, is particularly in point here in that it holds that courts shall take into consideration *matters*

of common knowledge in determining whether a conception involves invention. The court stated the rule as follows:

“In determining whether a patent covers a process, the conception of which involves invention, the court is not required to shut its eyes to matters of common knowledge. (*King v. Gallum*, 109 U.S. 99, 27 L. Ed. 870.) The court may take into consideration common or general knowledge tending to show the devices or process described in the patent is old or lacking in invention, and the court may refresh and strengthen its recollection of what facts are of the common and general knowledge at the time of the application for patent by reference to any printed source of information which is known to the court to be reliable and published prior to the application for patent. (*American Fibre-Chamois Co. v. Buckskin-Fibre Co.*, 72 F. 508.)”

In *King v. King et al.*, 109 U.S. 99, 27 L. Ed. 870, 871, the rule is stated as follows:

“In deciding whether the patent covers an article the making of which requires invention, we are not required to shut our eyes to matters of common knowledge or things in common use.”

The recent United States Supreme Court case of *Mandel Bros. v. Wallace*, Vol. 93, No. 1, U. S. Supreme Court, Law Ed. Advance Opinions, page 11, decided November 8, 1948, follows the same line of reasoning first established in the *Mast-Foos* case. The patent in suit related to a cosmetic preparation for retarding perspiration. The prior art included many

similar preparations which were undesirable because of their skin irritating and cloth corroding qualities. The patentees discovered an ingredient called "urea" which was capable of overcoming these deficiencies, and as a result they prepared a new compound which they patented. The patented preparation met with tremendous commercial success throughout the country. (*Wallace v. Mandell Bros.*, 164 F. (2d) 861, 862.) The use of "urea" had not been previously used in antiperspirants, but it was a matter of public knowledge that it had previously been used as a corrosion inhibitor in other types of compounds. The Supreme Court in holding the patent invalid stated:

"All that these patentees did was to utilize in a cosmetic preparation, publically available knowledge that urea would inhibit acidic corrosion. *The step taken by the patentees in advance of past knowledge was too short to amount to invention. They merely applied an old process of inhibition to a new cosmetic use.* This is not invention."

In the Supreme Court case decided January 3, 1949, *Jungersen v. Ostby and Barton Company et al.*, reported in Vol. 619, Patent Office Gazette, at page 611, it was again held that invention was not involved in applying a technique old in other arts to a new use. In holding the Jungersen patent invalid for lack of invention the court said:

"The patentee contends, however, that jewelry casting is a separate and distinct art; that consequently the advancements in other types of casting mentioned above cannot be viewed as the prior art in reference to this patent. The answer to this is

two fold * * * we think that the improvements in the art of casting which were disclosed by the patents and publications discussed above were so obviously applicable to the type of casting to be effected by Jungersen that he was bound by the knowledge of them.”

**(b) THE PATENT CLAIMS ARE INVALID BECAUSE THEY
DEFINE AN EXHAUSTED COMBINATION.**

The claims of the patent in suit set forth a structure consisting of two finger rings in combination with interlocking means of the dovetail tongue and groove type for holding them in connected relationship. The combination of two finger rings in combination with mechanical means for holding them in connected relationship, is not new in the art. The Kaas, Thomas, Harris and Bullard patents each show two finger rings held in interlocked relationship. The mechanical connecting means of each of these patents operates in the identical same manner as the dovetail tongue and groove connection of the patent in suit. They each hold the two rings in connected relationship and prevent their relative rotation. Obviously this combination is not the subject matter for further patenting. It is an exhausted combination. If there was any patentable novelty involved in the purported Granat invention it resided in the connecting means per se, rather than in a combination which included the two finger rings. None of the claims, however, define the dovetail tongue and groove connecting means per se.

The claims of the patent in suit are therefore fatally defective. Finding No. 5 is therefore clearly erroneous.

It is to be noted that the patentee Joseph Granat himself considered his invention to reside in the connecting means per se. Mr. Granat testified as follows (Granat deposition, page 9):

“Mr. Trabucco. Q. Do you consider your invention to reside in the interlocking means between the rings?

Mr. Mellin. Object to that on the ground that the patent speaks for itself.

A. Interlocks—you have all the information right there in the patent—it is all there.

Mr. Trabucco. Q. The question was is the invention set forth in the patent, does that consist in the means for holding the rings together in interlocked relationship?

A. Yes.”

A leading case on this subject is *Bassick Mfg. Co. v. Hollingshead Co.*, 298 U. S. 415, 80 L. Ed. 1251. There the subject matter of the Gullborg patent in suit was a device for lubricating the bearings of automobiles. The combination disclosed by the Gullborg patent in suit consisted of a grease pump, a hose or coupler, and a grease cup or pin fitting associated with the bearing to be lubricated. The elements were all old, but the inventor provided a new type of coupler for connecting the hose with the grease cup or fitting. In holding the patent invalid the court said at page 424 (L. Ed. 1256):

“It is plain that Gullborg invented improvements in two of the mechanical elements of an old combination consisting of a grease pump, hose, hose coupler and grease cup or pin fitting. * * * he claimed a combination of pump, hose coupler, and pin fitting, and embodied in the combination his improved form of coupler. * * * *The question then is whether the patentee, by improving one element of an old combination whose construction and operation are otherwise unchanged, may, in effect re-patent the old combination by reclaiming it with the improved element substituted for the old element. That this cannot be done is shown by numerous cases in this and other federal courts.*”

In the later case of *Lincoln Engineering Co. v. Stewart Warner Corp.*, 303 U. S. 545, 82 L. Ed. 1008, the same ruling was made with respect to a similar combination. There the Butler patent involved apparatus for lubricating bearings of automobiles, and it employed a nipple or fitting connected to the bearing to be lubricated, a gun or pump for propelling the grease under pressure, a hose or conduit for connecting the gun with the fitting, and coupling means for connecting the conduit to the fitting, and for making a tight joint during the greasing operation. It was old in the art to provide a fitting or nipple, a grease gun and a coupler, but it was contended that since the nipple operated in an improved and novel manner, unlike similar devices of the prior art, the claims defining the entire combination were valid. The court, however, disregarded this contention and held the patent in suit invalid, at page 550 (L. Ed. 1010), the court said:

“The improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination. * * * The invention, if any, lies in the coupling device alone.”

In *Etter v. Kauffman*, 32 F. Supp. 186, 189 (sustained in 121 F. (2d) 137), the same doctrine was stated as follows:

“We cannot see that the whole wringer structure could be covered by a combination claim by the mere improvement of one element of an old combination.”

(Citing *Bassick v. Hollingshead and Lincoln v. Stewart-Warner Corp.*, supra.)

The same rule was applied in *Re: Application of Trier*, 163 F. (2d) 575, 578, as follows:

“Those claims call for the combination of an intermittently operated conveyor and a plurality of spraying devices designed to supply liquid to articles on the conveyor. This combination is clearly shown to be old in the Ladewig patent. Any novelty which those claims present over the disclosure in that patent therefore, resides in the spraying devices per se or in the specific conveyor structure and not in the association of a plurality of such devices with a conveyor. *The improvement of one element of an old combination does not justify a claim to the improved element together with old parts which perform no new function in the combination.*”

In *Krause v. Coc*, 120 F. (2d) 717, 718, the court said:

“The only new specific thing that Krause has done is to substitute, in a flush valve, a rubber or a graphite rubber packing for any other possible type; apparently leather has been the common packing material although previous patents have mentioned any suitable material. Why then should Krause make combination claims on this whole valve. He argues that his packing was such an improvement that it made all the parts of the valve work in a new and unexpected cooperation justifying the combination claims * * *. There may have been a new and unexpected result in that Krause’s device worked better than any previous valve or that it worked better than anticipated * * *. Krause may have a better packing that makes a better valve but there is no unexpected or different cooperation. To say that the Krause flush valve works better than any other one is not to say that something new has been invented. Patentable invention takes more imaginative association of old and new than that.”

In *Visser Products Co. v. National Pressure Cooker Co.*, 71 F. Supp. 973, 979, the District Court, in holding the contested claims invalid, stated as follows:

“A patentee cannot by improving one element of an old combination whose construction and operation is otherwise unchanged, in effect, repatent the old combination by reclaiming it with the improved element substituted for the old element. All Vischer did was to substitute the rubber blow-out plug, for the fusible blow-out plug, which is

not invention. *Any patented device all the elements of which are old and each of which performs the same function taught by the prior art, fails of invention.*" (Citing *Bassick v. Hollingshead*, supra.)

(c) THE COMBINATION OF THE PATENT IN SUIT DOES NOT CONSTITUTE INVENTION.

It is apparent that all of the elements of the Granat ring ensemble are old in the art. In each of the patents to Kaas, Bullard, Thomas and Harris is found two finger rings held in joined relationship by mechanical connecting means. In each of these patents the two rings of the ensemble when on a person's finger are secured against independent rotation and also against detachment by the same mechanical connecting means which holds them in joined relationship. In the patent in suit the dovetail tongue and groove connecting means functions in precisely the same manner as the mechanical connecting means of the prior art. (R. p. 77.) Granat's connecting means performs no new function. It merely holds the two rings of the ensemble when worn on a person's finger against relative rotation and against detachment. In so far as the connecting means per se is concerned it embodies the same elements and functions in the exact manner as the dovetail tongue and groove or mortise and tenon connecting means disclosed in Atkinson, Grierson, and the various other representative patents listed herein. All of such connecting means, including that of the

patent in suit operate to hold two elements in connected relationship.

It is well established in patent law that the assembly of a number of well known elements which function in a well known manner without performing new and unexpected results, does not amount to invention. Such an assembly is an "aggregation", not a "patentable combination".

In *Richards v. Chase Elevator Co.*, 158 U. S. 299, 302, 39 L. Ed. 991, 993, the rule applicable here is stated as follows:

"So long as each element performs some old and well known function, the result is not a patentable combination, but an aggregation of elements."

In *Grinnell Washing Machine Co. v. Johnson Co.*, 247 U.S. 425, 433, 62 L. Ed. 1196, 1200, the court said:

"Applying the rule thus authoritatively settled by this court, we think no invention is shown in assembling these old elements for the purpose declared. *No new function is 'evolved from this combination; the new result, as far as one is achieved, is only that which arises from the well known operation of each one of the elements.'*"

In *Powers-Kennedy Contracting Corporation v. Concrete Mixing and Conveying Company*, 282 U.S. 174, 186, 75 L. Ed. 278, 286, it is said:

"Neither the combination of old elements or devices accomplishing no more than an aggre-

gate of old results, nor the use of an old apparatus or appliance for a new purpose is invention.”

In *Elliott Core Drilling Co. v. Smith*, 50 F. (2d) 813, 816, 9th CCA, this court stated the rule applicable here as follows:

“A mere carrying forward of the original thought, a change only in form, proportions or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent.”

The same rule is restated in *Willamette-Hyster Co. v. Pacific Car & Foundry Co.*, 9th CCA, 122 F. (2d) 492, 501.

In *Blanc v. Spartan Tool Co.*, 168 F. (2d) 296, 299, 7th CCA, the court said:

“Bringing together of old devices, without securing some new and useful result as the joint product of the combination, does not constitute a patentable invention, 141 U.S. 539; 35 L. Ed. 879, and when no new function results from a combination of elements and the new result is merely that which arises from the operation of each one of the elements, the arrangement does not constitute invention. There is merely an ‘aggregate of old results.’ ”

In *Dallas Machine & Locomotive Works, Inc. v. Willamette-Hyster Co., et al*, 112 F. (2d) 623, 626, 9th CCA, this court in holding the patent in suit

invalid because it covered an unpatentable aggregation, stated the rule as follows:

“* * * mere aggregation of a number of old parts or elements which in the aggregation, perform or produce no new result or different function or operation than that theretofore performed or produced by them is not patentable invention.” (Citing *Lincoln Engineering Co. v. Stewart Warner Corp.*, 303 U.S. 545, 549; 82 L. Ed. 1008; *Hailes v. Van Wormer*, 87 U.S. 353, 368; 22 L. Ed. 241.)

In *Wilson-Western Sporting Goods Co. v. Barnhart*, 81 F. (2d) 108, 110, 9th CCA, this court held the patent in suit covering a golf club invalid. One of the references relied on to show anticipation was a Robertson patent showing a fishing rod. In the court's opinion it was stated:

“It may be objected that Robertson's patent did not deal with golf clubs. It is well established, however, that ‘the application by the patentee of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original in the sense of the patent law’ is fatal to the patent.

“A mere carrying forward or a more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent.” (Citing *Smith v. Nichols*, 21 Wall. (88 U.S.) 112, 119; 22 L. Ed. 566.)

In *Eagle, et al. v. P. & C. Hand Forged Tool Co.*, 74 F. (2d) 918, 920, 9th CCA, the patent in suit relating to a wrench handle, was held by this court to be invalid. In view of the similarity between the subject matter of the present suit and that of the reported case, the rule stated by this court at page 920 is particularly applicable here:

“It is not necessary that all of the elements of the claim be found in one prior patent. If they are all found in different prior patents and no functional relationship arises from the combination, the claim cannot be sustained. *Keene v. New Idea Spreader Co.*, 231 F. 701.

“All the elements of the patent in suit were present in the prior art, and combining these elements to make the patented device did not involve invention. Widespread use of the device combining these elements old in the art is evidence of its utility, but is not conclusive of its patentable novelty.”

The court's opinion in *Dailey v. Lipman, Wolfe & Co.*, 88 F. (2d) 362, 9th CCA, is particularly in point here in that it holds no invention is involved in a combination wherein a device thereof is the equivalent of and performs the same function as a similar device found in the prior art. In the case at bar the dovetail tongue and groove connecting means of the patent in suit, being a device for holding two elements in interconnected relationship, is the full equivalent of the devices used for the same purpose

as found in Thomas, Atkinson and the various other prior art patents.

Findings 13 and 16 in view of the foregoing are obviously in error.

COMMERCIAL SUCCESS HAS NO WEIGHT HERE.

Appellees contend that the commercial success of their patented ring ensemble indicates patentable novelty. The testimony of Mr. Wineroth a witness for appellees indicates that several types of interlocking rings have been and now are being sold by appellee Granat Bros. (R. pp. 110, 119). In describing the first ring ensemble manufactured and sold by said appellees the witness described the combination disclosed in the Granat patent No. 1,982,864. (R. p. 113). It is therefore to be assumed that at least some of the so-called commercial success claimed by appellees is attributable to ring ensembles having locking means other than the dovetail tongue and groove type of the patent in suit.

Irrespective of whether the patented ring ensembles sold by appellees met with commercial success, evidence on this point does not carry any weight since it is most apparent that the purported Granat invention does not possess patentable novelty. Only when patentable novelty is in doubt can commercial success have any weight in sustaining a patent.

There are many cases on this subject including *McClain v. Ortmyer*, 141 U.S. 419, 35 L. Ed. 800;

Lovell Mfg. Co. v. Cary, 147 U.S. 623, 37 L. Ed. 307; *Duer v. Corbin Cabinet Lock Co.*, 149 U.S. 216, 37 L. Ed. 707, etc.

In the recent *United States Supreme Court Case of Dow Chemical Co. v. Halliburton Co.*, 324 U.S. 319, 331, 89 L. Ed. 973, 981, the court said:

“Petitioner claims the Grele-Sanford process has filled a long felt want and has been a commercial success. But these considerations are relevant only where all other proof leaves the question of invention in doubt.”

In *Florence Mayo Nuway Co. v. Hardy*, 168 F. (2d) 778 at page 787, the court said:

“I think the Judgment of the District Court should be affirmed. It takes something more than commercial success of a device and the imitation of one's product by a competitor to establish the validity of a patent.”

The Circuit Court of Appeals for the Second Circuit has recently further discredited the “commercial success” influence on the patentability of inventions by referring to the trend of recent United States Supreme Court decisions on this subject. The case of *Jungerson v. Baden*, 166 F. (2d) 807, 811, states as follows:

“In the past the commercial success enjoyed by plaintiff might well have sufficed to tip the balance in favor of validity. *Recent Supreme Court pronouncements indicate clearly that commercial*

success cannot raise a combination of known elements to the exalted level of invention."

Citing *Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U.S. 327, 89 L. Ed. 1644; *Funk Bros. Seed Co. v. Kalo Inoculent Co.*, 68 S. Ct. 444, 92 L. Ed. 414.

In the very recent *Supreme Court Case of Jungerson v. Ostby and Barton Company, et al.*, decided January 3, 1949, reported in Vol. 619, Patent Office Gazette, p. 611, the court again repeated the rule with respect to commercial success as follows:

"The fact that this process has enjoyed considerable commercial success, however, does not render the patent valid. It is true that in cases where the question of patentable invention is a close one, such success has weight in tipping the scales of judgment toward patentability. Where, as here, however invention is plainly lacking, commercial success cannot fill the void. Increased popular demand for jewelry or alertness in exploitation may have played an important part in the wide use of the patent. We cannot attribute Jungerson's success solely or even largely to the novelty of his process. We hold the patent invalid for want of invention."

Goodman v. Paul E. Hawkinson Co., 120 F. (2d) 167, 173 Ninth Circuit Court of Appeals, is an authority supporting appellants' contention with respect to the question of commercial success. There it was held that there is an element of unfairness in a contention that commercial success is to be attributed

to certain claimed structures where there were various similar structures being sold.

In *McGhee et al. v. La Sage & Co. Inc.*, 32 F. (2d) 875, Ninth Circuit Court of Appeals, this court held that commercial success does not necessarily indicate novelty.

CONCLUSION.

Summarizing the foregoing it will be noted that in the present case the presumption of validity sometimes attending the issuance of a patent is negatived by the failure of the Patent Office examiner to cite pertinent prior art during the prosecution of the patent application which resulted in the issuance of the patent in suit. The patent in suit is invalid for the reason that the purported invention claimed therein is fully anticipated by the prior art. The mere substitution of one well known and commonly used type of connecting means (dovetail tongue and groove connection) for another type in an interlocking ring ensemble, is not inventive nor does it amount to patentable novelty. The claims of the patent in suit are each fatally defective and invalid in that they set forth an old and exhausted combination. The Granat ring ensemble does not amount to invention since it is merely an assemblage of old and well known devices.

It is therefore submitted that plaintiffs' complaint for a declaratory judgment decreeing the patent in

suit to be invalid should be sustained and that appellees' cross-complaint alleging infringement should be dismissed. The judgment of the lower court should be reversed.

Dated, San Francisco, California,

March 18, 1949.

J. E. TRABUCCO,

Attorney for Appellants.

No. 12,160

IN THE
United States Court of Appeals
For the Ninth Circuit

RALPH D. GOMEZ and WILLIAM HENDER-
SON, as individuals and co-partners
doing business under the name of
Gomez Manufacturing Company,

Appellants,

vs.

GRANAT BROS. (a corporation) and JOSEPH
GRANAT,

Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

MELLIN AND HANSCOM,

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BRIEF FOR APPELLEES.

PRELIMINARY.

There are but two issues here. One is, did the production of the device of the patent in suit involve invention? Determination of that issue also determines the second issue, which is, is the patent in suit valid?

We should point out to the Court that the attack on validity is that the production of the device of the patent did not involve invention. There is no issue here of infringement because appellants stipulated

infringement if the patent is valid. In fact, as the District Court found (finding 20—Tr. 33), the appellants' accused ring ensemble is substantially identical in construction and mode of operation to the ring illustrated, described and claimed in the patent in suit, and is a substantial copy of appellees' commercial ring ensemble made under that patent.

SUMMARY OF THE ARGUMENT.

1. In that appellants make no contention that the findings of fact of the District Court are not fully supported by substantial evidence, or that the District Court misapplied the law to the facts as found, this Court should refuse to re-try the facts and should not disturb the findings of fact of the District Court under rule 52(a) F.R.C.P., including the ultimate findings of invention and validity.

2. The prior art cited by the patent office during the prosecution of the application which resulted in the issuance of the patent in suit was the most pertinent prior art on the subject of the patent in suit, and the additional prior art offered in evidence was merely cumulative and therefore the patent in suit stands before this Court strengthened with the presumption of validity due to its issuance as well as the fact findings of the District Court that it involved invention and is valid.

3. The prior art does not anticipate the invention of the patent in suit in that the District Court found that the device of the patent in suit accomplishes a

result in a manner substantially different from the prior art and by means substantially different than the prior art, and produced the result in a novel and improved manner.

4. The patent claims are not for an exhausted and old combination under the rule of the “Barbed Wire Patent Case” *Washburn & Moen Manufacturing Co. et al. v. Beat 'Em All Barbed-Wire Co. et al.*, 143 U.S. 275, 12 S. Ct. 443, but to the contrary define a new and novel structure unanticipated by the prior art and involving invention.

5. The structure of the patent in suit does constitute invention and is not an obvious mechanical expedient for accomplishing the result, in that the District Court found that its production involved more than the skill of one skilled in the art and constituted invention.

6. The unusual commercial success of the device of the patent in suit is a factor which should be considered in this case, not as a substitute for invention but as evidence emphasizing the presence of invention in the device of the patent in suit.

7. The appellants here give tribute of their praise to the prior art, but gives the tribute of their imitation to the patented device by wilfully precisely copying it, when the prior art was open to their use.

ARGUMENT.

THE DISTRICT COURT'S FINDINGS OF FACT, BOTH EVIDENTIARY AND ULTIMATE, ARE COMPLETELY SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE DISTRICT COURT PROPERLY APPLIED THE LAW TO THE FACTS.

Appellants make no contention that the findings of fact of the District Court are not fully supported by substantial evidence nor do appellants contend that the District Court misapplied the law to the facts as found. From appellants' brief it is manifest that what appellants are asking this Court to do is in effect to re-try the facts of this case *de novo*. This Court under rule 52(a) F.R.C.P.† and its decisions in the cases of *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 9 Cir., 151 Fed. (2d) 91, and *Bianchi v. Barili*, 168 Fed. (2d) 793, has consistently and properly refused to re-try the facts in patent cases on appeal and to disturb the District Court's findings of fact where the latter are fully supported by substantial evidence and are not clearly erroneous.

We urge that this case presents precisely the situation where such a rule should be applied. The District Court's findings on the evidence are detailed and precise and, as will be brought out later on herein, such findings are fully supported not only by substantial

†“* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses * * *.”

Federal Rules of Civil Procedure, Rule 52(a).

See also:

Maulsby v. Conzevoy, 161 Fed. (2d) 165, 9 Cir.;

Refrigeration Engineering, Inc. v. York Corporation, 168 Fed. (2d) 896, 9 Cir.

evidence but, for the most part, uncontradicted evidence.

Nowhere have appellants in their brief challenged this. Therefore, we urge that this Court under rule 52(a) F.R.C.P. should not disturb such findings of fact, including the ultimate findings of invention and validity. On this point we point out that there is no contention of non-infringement because appellants have admitted on page 7 of their brief:

“Admittedly, the ring ensemble manufactured by appellants comes within the scope of the patent in suit, * * *”.

We further emphasize that appellants nowhere in their brief challenge or argue that the District Court did not come to the proper legal conclusions upon the findings of fact as found by the District Court. Thus, the only issues raised here are factual ones, and appellants seek to have this Court re-try the facts and substitute new findings of facts for those of the District Court. In that the findings of fact of the District Court are supported by substantial evidence, we respectfully urge that this appeal should be dismissed.

APPELLANTS ON PAGE 7 OF THEIR BRIEF STATE: "The art cited by the Patent Office was woefully meager, and practically all of the prior art which should have been considered during the prosecution of the patent application was overlooked". THIS IS ENTIRELY ERRONEOUS AND IS CONTRARY TO THE DISTRICT COURT'S FINDING OF FACT.

The District Court found as a fact (finding 17—Tr. 33):

"17. That the prior art before the Patent Office was the most pertinent prior art on the subject of the patent in suit, and that the additional prior art offered in evidence was no closer to the patent in suit than that which was before the Patent Office during the prosecution of the application which resulted in the patent in suit."

In their brief appellants state to the Court (pages 7 and 8) that the prior art cited by the Patent Office was the combination of an engagement ring and a wedding ring held in locked engagement. Appellants complain, however, that the Patent Office did not cite four additional and similar patents, further removed from the patented structure than that cited by the Patent Office (according to the evidence and findings). This complaint by appellants despite the fact that appellants were unable at the trial to point out to the District Court and are now unable in their brief to point out to this Court that the additional patents were closer to the construction and mode of operation of the patented device than was the prior art cited by the Patent Office. Such citation of additional patents on the part of the Patent Office would have been merely cumulative and would have had no bearing on

the patentability of the patented device. Therefore, the Court's above finding is based on substantial evidence and should not be disturbed. The remaining patents which appellants complain were not cited by the Patent Office are for furniture, wooden tubs, building constructions, machinery in general, such as large pipe couplings and the like, and are totally unrelated to the subject of wedding ring ensembles, which is the subject of the patent in suit.

Appellants list these patents, which they contend the Patent Office failed to cite, on page 8 of their brief as follows (and we list the subject matter disclosed therein opposite each):

Kelly	152,233	(Discloses a large wooden tub, Tr. 83)
Kaas	424,211	(Ring)
Bullard	464,749	(Finger ring)
Linderman	517,348	(Lumber trimming-floors, Tr. 83)
Grierson	959,854	(Coupling for large pipe, Tr. 84)
Atkinson	942,047	(Coupling for large pipe, Tr. 83)
Tschirgi	1,482,772	(Concrete pipe joint, Tr. 84)
Thomas	1,536,540	(Ring)
Beaujard	1,712,417	(Ring)
Hubbard	1,715,293	(A drive shaft coupling, Tr. 85)
Mittleburg	1,829,366	(Wooden furniture, Pl. Ex. 3)
Birnbaum	1,877,750	(Removably attaching characters to an ornamental backing, Pl. Ex. 3)

The District Court, after examining all of these patents and considering all of the testimony found as a fact (finding 17 quoted above) that the prior art cited by the Patent Office was the most pertinent prior art. Therefore, this finding, being based upon sub-

stantial evidence, should not be disturbed, and appellants should not succeed in having this Court re-try the facts.

Therefore, we contend that the patent in suit comes to this Court with a strengthened presumption of validity attached to it because of its issuance in view of the most pertinent prior art, and also comes to this Court with the findings of fact of the District Court, both evidentiary and ultimate, that the structure shown in the patent amounted to an invention and that the patent is valid.

“* * * To the presumption of validity that attaches to a granted patent, where the most pertinent prior art has been cited against it in the patent office, there must probably now be added the force of a growing recognition of finality that is generally being accorded to administrative determinations supported by evidence, on the ground that the administrative agency is expected to have developed an expertness in its specific field beyond what may be expected from the courts wherein adjudications range the whole field of human controversies * * *.”

Williams Mfg. Co. v. United Shoe Mach. Corporation, 121 F. (2d) 273, 277 (C.C.A. 6, 1941 (Aff'd 316 U.S. 364, 86 L. Ed. 1537)).

APPELLANTS BASE THEIR APPEAL UPON THREE PROPOSITIONS (PAGE 12 APPELLANTS' BRIEF) THE FIRST OF WHICH IS "(a) Because the prior art fully anticipates the purported Granat invention", WHICH IS NOT ONLY CONTRARY TO THE DISTRICT COURT'S FINDING OF FACT BUT CONTRARY ALSO TO THE EVIDENCE.

As to anticipation, the District Court found as a fact that the Patent Office had considered the most pertinent prior art (finding 17—Tr. 33) before granting the patent. After an independent consideration of all the prior art cited by the appellants here, the District Court found as fact (Tr. 32-33):

"12. That while the prior art offered in evidence discloses wedding and engagement rings which latch together, the rings illustrated, described and claimed in the patent in suit accomplish that result in a manner substantially different than the prior art and by means substantially different than the prior art and produce the old result in a novel and improved manner.

"13. That the ring construction illustrated, described and claimed in the patent in suit No. 2,059,228 was not an obvious mechanical expedient for accomplishing the result, and its production involved more than the skill of one skilled in the art and constitutes invention."

* * * * *

"18. That the invention forming the subject matter of the patent in suit is not anticipated by the prior art in evidence herein."

The appellants nowhere in their brief contend that such findings of fact are not supported by substantial evidence and are clearly erroneous, nor do they con-

tend that such findings of fact are not supported by the preponderance of the evidence. In that appellants are unable to make such a showing, these findings of fact should not be disturbed by this Court under rule 52(a) F.R.C.P., as discussed on pages 4 and 5 of this brief.

THE SECOND BASIS OF APPELLANTS' APPEAL "(b) Because the patent claims are fatally defective in that they define an exhausted and old combination consisting of two connected finger rings together with a certain kind of connecting means, namely a dovetail tongue and groove or mortise and tenon connection, the invention if any residing in the connecting means per se" **IS ALSO CONTRARY TO THE DISTRICT COURT'S FINDINGS OF FACT AND TO THE EVIDENCE.**

As to the above quoted basis, which in effect is that the patent shows an exhausted and old combination, the District Court found as facts (Tr. 33-30):

"16. That although dovetail, tongue and groove or mortise and tenon devices were widely used in furniture making and the like and in the machinery business in general, the conception and practical application of the principle thereof to wedding and engagement ring ensembles to accomplish the result of preventing relative rotation and axial movement between such rings was the result of more than mere mechanical skill and was the result of invention."

"5. That the claims of the patent in suit are not for an exhausted or old combination but properly define a patentable invention."

Appellants nowhere in their brief contend, nor show, that such findings of fact are not supported by substantial evidence or the preponderance of the evidence, and in that appellants fail so to do, these findings should not be disturbed by this Court.

The sole premise of appellants' argument that the patent shows an exhausted and old combination is not that the patented device does not differ from the prior art ring patents, but is based on the broad premise that the prior art shows a wedding ring and an engagement ring latched together albeit they are differently constructed so that they latch together.

Appellants then go on to argue that because the patented ring construction enabling latching resembles constructions which are old in the furniture and other entirely unrelated arts, the patented device is nothing more than an exhausted and old combination. The fallacy of this argument is that no prior art patent shows a latching construction equivalent to the patented device in connection with wedding and engagement rings, and *no patent teaches how such a latching construction could be applied to wedding and engagement rings*. The District Court recognized this and such is the basis of the District Court's finding 16 (Tr. 33):

“16. That although dovetail, tongue and groove or mortise and tenon devices were widely used in furniture making and the like and in the machinery business in general, the conception and

practical application of the principle thereof to wedding and engagement ring ensembles to accomplish the result of preventing relative rotation and axial movement between such rings was the result of more than mere mechanical skill and was the result of invention.”

Manifestly, appellants have not shown that the above quoted finding is in error, or is not based upon substantial evidence. Consequently, appellants’ contention that this finding is clearly erroneous should be rejected and the finding should not be disturbed. Appellants, in making the above argument, mistakenly argue that a device to be invention, all individual parts thereof must be novel. This is clearly erroneous. A patent on a combination of any sort, in the language of the authorities, pre-supposes that all of the parts may be old.

There are numerous decisions to the effect that the fact all of the elements of a claimed combination are individually old does not detract from the patentability of the combination if the combination be new.

“* * * Conceding for the purpose of the argument, *that the elements are all old* and that each element used produces no new result, yet we are convinced that a beneficial result has been produced in a more efficient, economical and facile manner, and we feel constrained to hold the claims valid. *New York Scaffolding Co. v. Whitney*, 8 Cir., 224 F. 452.” (Italics ours.)

E. R. Wagner Mfg. Co. v. Porter Steel Specialties, 116 F. (2d) 63, 67 (C.C.A. 7, 1940).

“In discussing the validity of the patent in suit, *it may be admitted that all the elements in appellee’s structure were old in the art.* Appellee claims, however, that its structure is a new combination of these elements which produces a novel and useful result (or an old result in a more facile, economical, and efficient way). If this be true, it is sufficient to uphold the patent. *New York Scaffolding Co. v. Whitney (C.C.A.), 224 F. 452.*” (Italics ours.)

Young Radiator Co. v. Modine Mfg. Co., 55 F. (2d) 545, 546 (C.C.A. 7, 1931.)

The facts of this case are quite close to the facts of the leading case of *Washburn & Moen Manufacturing Co. et al. v. Beat ’Em All Barbed-Wire Co. et al., 143 U.S. 275, 12 S. Ct. 443* (the barbed wire patent). In that case our Supreme Court held valid a patent on what we now know as barbed wire. The prior art there considered consisted of twisted fence wire having spaced barbs strung thereon. The invention consisted in making the barbs out of short pieces of wire and twisting such barbs about the fence wire for the purpose of attachment. Obviously, it was not new prior to that time in other arts to connect two wires together by intertwisting. The Supreme Court held that although the change was a simple one, the new structure was a very meritorious invention and sustained the patent.

In the present case the District Court, in view of all of the evidence, found as a fact (finding 15—Tr. 32) that the production of the particular ring ensemble

described and claimed in the patent in suit was the first in the art to provide a commercially *practical* ring ensemble or set of a wedding ring and engagement ring capable of being latched together to prevent relative rotation and axial movement when worn upon the finger.

The District Court also thoroughly considered the prior art and its effect on the patent in suit, and in particular considered the precise question raised by appellants, and after such consideration found as a fact (finding 16—Tr. 33) that although dovetail, tongue and groove or mortise and tenon devices were widely used in furniture making and the like and in the machinery business in general (shown by prior art patents which appellants complain were not cited by the Patent office), *the conception and practical application of the principle thereof to wedding and engagement ring ensembles to accomplish the result of preventing relative rotation and axial movement between such rings was the result of more than mere mechanical skill and was the result of invention.*

We therefore, contend that the findings of fact, both evidentiary and ultimate, as to exhausted combination and invention were not only based upon substantial evidence but upon the preponderance of the evidence, and that these findings of fact should not now be disturbed by this Court under rule 52(a) F.R.C.P.

THE THIRD AND FINAL BASIS OF APPELLANTS' APPEAL FOR REVERSAL OF THE DISTRICT COURT "(c) Because the combination of the patent in suit does not constitute invention" IS CONTRARY TO THE DISTRICT COURT'S FINDINGS OF FACT, WHICH FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD NOT BE DISTURBED BY THIS COURT.

On the question of invention the District Court found as a fact (Tr. 32-33):

"13. That the ring construction illustrated, described and claimed in the patent in suit No. 2,059,228 was not an obvious mechanical expedient for accomplishing the result, and its production involved more than the skill of one skilled in the art and constitutes invention.

"14. That the ring construction illustrated, described and claimed in the patent in suit No. 2,059,228 was not the result of mere mechanical skill but was the result of the inventive faculty.

"15. That the patentee of the patent in suit by producing the ring ensemble or set illustrated, described and claimed in the patent in suit was the first in the art to provide a commercially practical ring ensemble or set of a wedding ring and engagement ring capable of being latched together to prevent relative rotation and axial movement when worn upon the finger.

"16. That although dovetail, tongue and groove or mortise and tenon devices were widely used in furniture making and the like and in the machinery business in general, the conception and practical application of the principle thereof to wedding and engagement ring ensembles to accomplish the result of preventing relative rotation and axial movement between such rings was

the result of more than mere mechanical skill and was the result of invention.”

Appellants in their brief do not contend, nor show, that these findings of fact were not based on substantial evidence or the preponderance of the evidence, but are again asking this Court to re-try the facts merely because of their contention that the District Court was in error.

In the argument appellants argue (page 35 of their brief):

“In each of the patents to Kaas, Bullard, Thomas and Harris is found two finger rings held in joined relationship by mechanical connecting means (*not the mechanical connecting means of the patent*). * * * Granat’s (*patentee*) connecting means performs no new function. * * * In so far as the connecting means per se is concerned it embodies the same elements and functions in the exact manner as the dovetail tongue and groove or mortise and tenon connecting means disclosed in Atkinson, Grierson, and the various other representative patents listed herein.” (Inserts ours.)

These latter patents are precisely the ones which the District Court was referring to in its finding 16 (Tr. 33) when it said that “although dovetail, tongue and groove or mortise and tenon devices were widely used in furniture making and the like and in the machinery business in general”.

The Court’s attention, however, is directed to the fact, first, that the District Court found in finding of fact 12 (Tr. 32) that while the prior art offered in

evidence discloses wedding and engagement rings which latch together, the patented structure *accomplished that result in a manner substantially different than the prior art and by means substantially different from the prior art, and produced the old result in a novel and improved manner.*

Appellants ignore in their argument that where one produces an "old result in a new, different and improved manner", he has produced a patentable device.

"* * * So a new combination of known devices, whereby the effectiveness of a machine is increased, may be the subject of a patent * * *."

Cantrell v. Wallick, 117 U.S. 689, 29 L. Ed. 1017, at 1018 (1886).

"With respect to the result produced, it is not essential that it be a wholly new result, but it is sufficient if an old result is effected in a more facile, economical, or efficient way. *Galvin Elec. Mfg. Co. v. Emerson Elec. Mfg. Co.* (C.C.A. 8), 19 F. (2d) 885, 888; *Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co.* (C.C.A. 8), 215 F. 362, 369; *New York Scaffolding Co. v. Whitney* (C.C.A. 8), 224 F. 452, 456; *National Hollow Brake-Beam Co. v. Interchangeable B.-B. Co.* (C.C.A. 8), 106 F. 693, 706, 707; *Skinner Bros. Belting Co. v. Oil Well Imp. Co.* (C.C.A. 10), 54 F. (2d) 896; *Grinnel Washington Mach. Co. v. E. E. Johnson Co.*, 247 U.S. 426, 432, 38 S. Ct. 547, 62 L. Ed. 1196."

Independent Oil Well Cementing Co. v. Halliburton, 54 F. (2d) 900, 905 (C.C.A. 10, 1932), (cert. denied 286 U.S. 544, 76 L. Ed. 1281).

“The result need not be new. It is sufficient if an old result be produced in a more facile, economic or efficient way. *Willard v. Union Tool Company*, 9 Cir., 253 F. 48; *New York Scaffolding Co. v. Whitney*, 8 Cir., 224 F. 452.”

Long v. Dick, 38 Fed. Supp. 214, 220 (Calif. D.C. 1941).

Secondly, appellants ignore the the District Court's finding 16 (Tr. 33) wherein the Court considered that although the dovetail connection was widely used in unrelated arts, such as furniture making and the machinery business in general, that the application of the principle of such device to wedding and engagement ring ensembles was not obvious and was the result of more than mechanical skill and, in fact, the result of invention. Appellants have not shown that this finding is not supported by the evidence or is clearly erroneous.

Appellants further ignore *and do not tell this Court in their brief where the prior art patents, taken singly or together, teach how a dovetail connection or a mortise and tenon connection could be applied to wedding ring ensembles*. Appellants fail so to do for the obvious reason that the prior art does not so teach or disclose such a teaching. Here again the “Barbed Wire Patent” case above cited, *Washburn & Moen Manufacturing Co. et al. v. Beat 'Em All Barbed-Wire Co. et al.*, 143 U.S. 275, 12 S. Ct. 443, is referred to because of its similarity of facts to the present case. There the prior art showed fence wire with barbs on it. Also, obviously it was old to connect two wires

together by twisting them in other arts. However, the patented structure was the first to make use of a barb of wire intertwisted with the fence wire to make a practical barbed wire fence, which act our Supreme Court held to be an inventive one. If appellants' argument in the present case is sound, then the "Barbed Wire Case" was erroneously decided.

ON PAGE 40 OF APPELLANTS' BRIEF APPELLANTS CONTEND "Commercial success has no weight here". TO THE CONTRARY WE BELIEVE THE COMMERCIAL SUCCESS OF THE PATENTED STRUCTURE IS A FACTOR TO BE CONSIDERED IN THIS CASE.

We are well aware of the rule, as reiterated by this Court, that commercial success cannot be substituted for invention. However, in a case such as the one at bar, where the District Court has found that the patented device accomplishes an old result in a novel and improved manner and in a way substantially different from the prior art, and that such patented device was the result of more than mechanical skill and in fact the result of invention, commercial success is a factor to be considered, particularly, when, as here, the appellants seek to have this Court set aside such findings of fact without showing that they are clearly erroneous and without showing that they are not based on substantial evidence and the preponderance of the evidence.

We call this Court's attention to the fact that the District Court found from the evidence ("Tr. 92) (find-

ing 7—Tr. 30) that long prior to the issuance of the patent in suit there was a recognized need or want in the jewelry trade for a practical wedding and engagement ring set that would latch together to prevent relative rotation and axial movement between the rings when worn on a finger. The District Court also found as a fact and based upon substantial evidence (Tr. 90-91) (finding 8—Tr. 30), that prior to the patent owner's production in 1934 of the ring structure shown in the patent in suit there were no ring ensembles on the market or offered for sale commercially in which the rings would latch together to prevent relative rotation and axial movement between the rings when worn on the finger. The District Court then went on in finding 9 (Tr. 31) to find from the evidence (Tr. 97 to 101) that upon the production by the patent owner of the ring ensemble of the patent in suit in 1934 such ring ensemble satisfied the long felt want or need in the jewelry trade for a wedding and engagement ring set which would latch together and prevent relative rotation and axial movement between the rings when worn upon the finger.

Further, the District Court from the evidence (Tr. 100-101) found in finding 10 (Tr. 31) that upon the production of the patented device in 1934 there was an immediate and widespread commercial demand for the patented ring, and that from the year 1934 on, the patent owner yearly sold approximately \$125,000 worth of the patented ring ensembles all over the United States.

Certainly, the above findings by the District Court and the evidence concerning the same are factors to be considered in determining whether an invention is present in the patented device. If it was so obvious from the prior art that such a ring structure could be produced, why then was there a long felt want in the jewelry trade for such a structure? Our answer is, of course, as is the answer of the District Court, that the production of the patented structure was not an obvious one and not a mere application of skill, but in fact one of invention.

The case at bar in this regard parallels the facts of the "Barbed Wire Patent Case", *Washburn & Moen Manufacturing Co. et al. v. Beat 'Em All Barbed-Wire Co. et al.*, 143 U.S. 275, 12 S. Ct. 443, in which the Supreme Court, in holding the patent valid, stated:

"It is true that the affixing of barbs to a fence-wire does not apparently give a wide scope to the ingenuity of the inventor; but from the crude device of Hunt to the perfected wire of Glidden, each patent has marked a step in the progress in the art. The difference between the Kelly fence and the Glidden fence is not a radical one, but, slight as it may seem to be, it was apparently this which made the barbed-wire fence a practical and commercial success. The inventions of Hunt and Smith appear to be scarcely more than tentative, and never to have gone into general use. The sales of the Kelly patent never seem to have exceeded 3,000 tons per annum, while plaintiff's manufacture and sales of the Glidden device (substituting a sharp barb for a blunt one) rose rapidly from 50 tons in 1874 to 44,000 tons in 1886,

while those of its licensees in 1887 reached the enormous amount of 173,000 tons. * * *

“Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins.”

Again comparing the case at bar to the “Barbed Wire Case”, the District Court found from the evidence there had been no successfully latched ring sets offered commercially prior to the patented one, and that immediately upon its commercial introduction, over \$125,000 per year were sold by the patent owner. Notice that the District Court also found from the evidence that prior to the production of the patented device, there was an actual long felt want and need in the jewelry trade for such a device. From this we argue that the production of the patented device was not an obvious expedient but was in fact an invention. The District Court certainly felt this way about it from the evidence.

Appellants seem to make some sort of a contention that some of the ring ensembles sold by the patent owner were not of the same construction as that shown in the patent. This is erroneous in view of the exact testimony. Mr. Joseph Wineroth (Tr. 100-101) testified in detail that the commercial success and sales above indicated were attributable to devices constructed precisely in the manner shown in the patent in suit, so that appellants’ vague assumption that the commercial success might be attributable to ring en-

sembles other than the patented device is not in accordance with either the testimony or evidence, or with the Court's precise finding of fact on the matter, which is as follows (Tr. 33):

"19. That defendant-cross-plaintiff's commercially successful ring ensembles were substantially identical in construction and mode of operation with that illustrated, described and claimed in the patent in suit No. 2,059,228."

THE APPELLANTS HERE GIVE TRIBUTE TO THE PRIOR ART BY THEIR CONTENTION THAT THE PATENTED STRUCTURE DID NOT AMOUNT TO INVENTION THEREOVER, YET THEY PAY TRIBUTE TO THE PATENTED DEVICE BY WILFULLY PRECISELY COPYING IT.

Under the title "Appellants' Ring Ensemble" on pages 6 and 7 of appellants' brief appellants seem to argue (contrary to the Court's finding) that appellants innocently infringed. This, however, is contrary not only to the District Court's finding of fact 22 (Tr. 34):

"22. That plaintiffs' cross-defendants' infringement of the patent in suit No. 2,059,228 was done knowingly and deliberately and in disregard of said patent No. 2,059,228 and defendant-cross-plaintiff's rights thereunder."

but is also contrary to the evidence. Mr. Wineroth (Tr. 105-106) testified that during the period from 1939 to 1941, inclusive, appellant Gomez set diamonds in approximately 3500 rings for the appellee here, between 18% and 22% of which were rings constructed exactly

in accordance with the patent in suit. Mr. Gomez did not deny this, but merely stated that he had never seen the patented structure before he made it. Yet, appellants admit in their brief (page 7) and the District Court found as a fact that the infringing device was almost an exact duplicate of the patented structure, as shown in the patent. The District Court had the witnesses in front of it, and from that testimony found as a fact (finding 22—Tr. 34) as above stated that the infringement was wilfull and in disregard of the patent. That finding, being supported by substantial evidence, should not be disturbed and appellants' contention in the brief of "innocent" infringement cannot be sustained. In all of this we recognize that innocent or not, the tort of infringement is complete, when the act of duplicating the patented device is performed.

However, we make the above point solely for one reason and that is that although appellants say that the prior art patents completely anticipate the patents in suit, they have copied the device of the patent in suit. Thus, with all of the prior art open which they could duplicate without any litigation and without any charge or liability of infringement, they chose instead to duplicate the patented structure. By so doing, they have paid to the patented device the high tribute of imitation and it does not come well from their mouths to contend lack of invention.

In this connection we are reminded of the language of Justice McKenna in *Diamond Rubber Co. v. Con-*

solidated Rubber Tire Company, 220 U.S. 426, 55 L. Ed. 527:

“* * * We see the strength of the concession to its (the patent’s) advance beyond the prior art and of its novelty and utility by the rubber company’s imitation of it. The prior art was open to the rubber company. That ‘art was crowded,’ it says, ‘with numerous proto-types and predecessors’ of the Grant tire, and they, it is insisted, possessed all of the qualities which the dreams of experts attributed to the Grant tire. *It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation, as others have done.*” (Italics ours.)

CONCLUSION.

We respectfully urge this Court that the appeal here should be dismissed on the grounds that the evidentiary and ultimate facts as found by the District Court are all fully supported by substantial evidence, and that the District Court did not misapply the law to the facts as found by it.

We call the Court’s attention to the fact that the factual situation in the case at bar precisely fits the statement made by this Court in *Bianchi v. Barili*, decided by this Court on June 15, 1948, and reported at 168 Fed. (2d) 793:

“Before a patent can be declared invalid because of anticipation, its lack of novelty must be established beyond a reasonable doubt. *Cantrell v. Wallick*, *supra*, 117 U.S. at pages 695, 696;

1 Walker §63, pages 300-303; American Bell Telephone Co. v. People's Telephone Co., C.C. N.Y., 22 F. 309, 313, affirmed, 126 U.S. 1, 572, 8 S. Ct. 778, 31 L. Ed. 863; Searchlight Horn Co. v. Victor Talking Machine Co., D.C.N.J., 261 F. 395, 401.

“Particularly heavy is the attacker’s burden when the validity of the patent has been sustained by court findings. General Motors Corporation v. Kesling, 8 Cir., 164 F. (2d) 824, 827, certiorari denied on March 15, 1948, 333 U.S. 855, 68 S. Ct. 732, and the many cases there cited.”

We respectfully submit that the judgment of the District Court may be affirmed.

Dated, San Francisco, California,

April 20, 1949.

Respectfully submitted,

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No. 12,160

IN THE

United States Court of Appeals
For the Ninth Circuit

RALPH D. GOMEZ and WILLIAM HENDER-
SON, as individuals and co-partners
doing business under the name of
Gomez Manufacturing Company,

Appellants,

vs.

GRANAT BROS. (a corporation) and JOSEPH
GRANAT,

Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

QUESTIONS OF PATENTABILITY ALWAYS REVIEWABLE.

Appellees in their brief (pages 4 and 5) contend that this court, in view of the lower court's findings as to the validity of the patent in suit, may not now review such findings. The evidence in this case, particularly the prior art, conclusively establishes the invalidity of the patent in suit, and the lower court's findings on this point are clearly erroneous and are not supported by either the evidence or the law. Ap-

pel·lees rely on *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 9 Cir., 151 F. (2d) 91, and *Bianchi v. Barili*, 168 F. (2d) 793, to support their theory that this court cannot review the lower court's findings with respect to the validity of the patent in suit. This court did not hold in these cases that questions relating to the validity of a patent in suit could not be reviewed on appeal. These cases merely hold that the burden of proof in cases where the invalidity of the patent in suit is in issue, rests upon the litigant opposing the patent.

The rule applicable here is clearly set forth in *Sales Affiliates v. National Mineral Co.*, 7th C.C.A., 172 F. (2d) 608, 613, as follows:

“Under the federal rules we are not at liberty to review the finding of fact of the District Court unless it is clearly erroneous. *Here the question of whether the patents are valid or invalid depends entirely upon the analysis of prior patents and a comparison of what is taught by them and what is taught by the patentees in the two patents in suit. This is not a case where the findings of fact depend upon disputed evidence or controverted facts, but is rather one where the ultimate findings depend upon whether recorded prior art is such that the patentee has achieved invention over and above the same.* In such a situation, we think the decision of the *Supreme Court in Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 31, 74 L. Ed. 174, is directly in point.”

In the case at bar appellants contend that the prior art in evidence here fully anticipates all of the claims

of the patent in suit. The findings of fact (Findings 12, 13, 14, 15, 16, 17 and 18) which are clearly in error and contrary to the controlling principles of law did not depend upon disputed evidence or controverted facts. As a matter of fact appellees produced no evidence whatsoever concerning the prior art either with respect to its pertinency or its relevancy. These findings of fact were therefore not dependent upon disputed evidence or controverted facts. The question as to the validity of the patent in suit depends upon an analysis of the prior patents here in evidence and a comparison of what is disclosed by them with what is taught by the patent in suit. This court has the authority to examine the prior art in evidence here with a view of determining whether the patent in suit is anticipated or lacks patentable novelty, and in this respect it may determine whether the findings of fact of the lower court on this issue are erroneous. This court has already ruled (*Carson Investment Co. v. Anaconda Copper Mining Co.*, 9 C.C.A., 26 F. (2d) 651, 661) that the appellate court need not adopt the findings of the trial judge.

In *Koochook Co. v. Barrett*, 8 Cir., 158 F. (2d) 463, 467, it was held that:

“* * * the findings of invention and validity are not sustained by the evidence and are clearly erroneous.”

This court in *Willamette-Hyster Co. v. Pacific Car & Foundry Co.*, 9th Cir., 122 F. (2d) 492, 499, stated as follows:

“We therefore hold that the validity of both the Walker and the Norse and Wicks patents may properly be considered on appeal.”

As pointed out in appellants' opening brief, it is apparent upon an examination of the prior art in this case that the patent in suit is invalid because the subject matter thereof is fully anticipated and that it is devoid of patentable novelty. It will also become apparent that the findings of fact on the issue of validity (Findings 12, 13, 14, 15, 16, 17 and 18) are clearly erroneous.

FINDING 17.

Appellees in their brief, page 6, contend that substantial evidence supports the finding “that the prior art before the Patent Office was the most pertinent prior art on the subject of the patent in suit.” The evidence on this point consists in the Harris patent, the Book of Prior Art Patents (Plaintiffs' Exhibit 3), and the File History of the patent in suit (Plaintiffs' Exhibit 2). The Harris patent discloses two rings held in interlocked relationship by a *plurality of clips* arranged at opposite sides of the rings. This was the *only* patent considered by the Patent Office examiner during the prosecution of the patent application. The Thomas patent in particular is a much closer reference than Harris, since it discloses a single lug or projection on the side of one ring interlocked within a recess in the side of the other ring. The interlocking

means of this patent operates to hold the two rings against relative rotation as well as against detachment when worn on a person's finger. The patent in suit discloses substantially the same type of connection; namely, a lug or projection on the side of one ring fitting within the recess in the side of the other ring. In both Thomas and in the patent in suit the single connecting means is mechanically the same, since they function in the same manner, comprise substantially the same elements (a lug and a recess) and are positioned in the same relative positions with respect to the crown portions of the rings.

The representative prior art patents such as Atkinson, Hubbard, etc., showing the common use in various arts, of dovetail tongue and groove connecting means, was not considered by the Patent Office examiner during the prosecution of the Granat patent application. This prior art when considered in connection with the Thomas and other patents showing mechanically connected ring ensembles, is particularly pertinent. In the light of the legal principles set forth in the various court decisions cited in appellants' opening brief, this prior art must be considered on an equal footing with respect to the prior art showing mechanically locked ring ensembles. Appellees do not deny the pertinency of these prior art patents and the lower court does not find against their pertinency.

Finding of fact 17 is contrary to the evidence and is clearly erroneous. Conclusion of Law No. 2, directed to the presumption of validity, is also clearly

erroneous and not established by the evidence, since it states that the presumption of validity has not been overcome by the evidence.

FINDINGS NOS. 12, 13 AND 18.

(Appellees' Brief, page 9.)

These findings are directed to the patentability of the purported Granat invention, and they are based on the lower court's deductions with respect to the prior art. The evidence on this subject is contained in the Book of Prior Art Patents (Plaintiffs' Exhibit 3), and, as indicated above, the prior art conclusively anticipates the patent in suit and clearly proves that patentable novelty is not present in the purported Granat invention. The error in these findings is fully discussed in appellants' brief under the headings "(a) The Patent in Suit is Anticipated by the Prior Art," page 12, and "(c) The Combination of the Patent in Suit Does Not Constitute Invention," page 35. These findings in view of the evidence and the controlling principles of law are clearly erroneous.

FINDINGS NOS. 16 AND 5.

On pages 10 to 14 of appellees' brief findings 16 and 5 are linked with the "Second Basis of Appellants' Appeal" relating to the fatal defect in the claims. It should be noted that the arguments given on these pages do not touch on appellants' defense concerning the fatal defect in the claims of the patent

in suit. The arguments and decisions on this point are fully given on pages 30, 31, 32, 33 and 34 of appellants' opening brief. *The basic fact that the claims of the patent in suit are entirely invalid because they define an exhausted combination, is not open to contradiction.* The patent in suit speaks for itself. This defense involves a question of fact as well as one of law, since in the first instance it must be recognized that it is old in the art to secure two rings together in interlocked relationship, and in the second instance it is a matter of law whether such an assembly is an exhausted combination. Finding of fact No. 5, which states that the claims of the patent in suit are not for an exhausted combination but properly define a patentable invention, is not supported by the evidence or law, and is clearly erroneous. *Willamette-Hyster Co. v. Pacific Car & Foundry Co.*, 9th Cir. 122 F. (2d) 492, 499, 500.

As to finding 16, it is not to be linked with finding 5, since they are related to entirely distinct matters. Finding 16 is directed to so-called mechanical skill embodied in the subject matter of the patent in suit over the prior art. This matter is fully discussed in appellants' opening brief under the headings "(a) The Patent in Suit is Anticipated by the Prior Art," page 12, and "(c) The Combination of the Patent in Suit Does Not Constitute Invention."

While on this subject a brief discussion of the cases relied upon by appellees in support of the validity of the patent in suit should be given.

In the case of *Young Radiator Co. v. Modine Mfg. Co.*, quoted from at page 13 of appellees' brief, the combination of old elements of the patent there in suit performed a number of uses which were new in the art. The patent was upheld on the ground that the combination performed a function which "for half a century no mechanic so far as the record shows had ever suggested such use." (55 F. (2d) 547). Here the patent in suit fails utterly to present the elements of a patentable combination. The two rings held in interlocked relationship is not new in the art; and the dovetail tongue and groove connecting means is neither new nor different in its operation from the connecting means shown in Thomas, Kaas and Bullard. All of these prior art patents disclose connecting means which holds two rings in interconnected relationship so neither can turn independently of the other or become detached when worn on a person's fingers. An examination of the patent in suit will readily disclose that the connecting means of the Granat ring ensemble functions in the same manner as the connecting means of the prior art.

In the *Wagner Mfg. Co. v. Porter Steel Specialties* case, page 12 of appellees' brief, the subject matter of the patent there in suit related to a carpet sweeper having brush cleaning means. The patent was upheld on the ground that the invention covered thereby included an element which performed an entirely new function. That is not the case here. The dovetail tongue and groove connecting means of the patent in suit performs the same function as the connecting means of

Thomas, Kaas and Bullard, namely the holding of two rings in interconnected relationship. This type of connecting means functions no differently when used to connect two rings together than it does when holding pipes, barrel staves, or other members in connected relationship.

In the case of *Washburn & Moen Mfg. Co. et al. v. Beat 'Em All Barbed Wire Co., et al.*, cited at page 13 of appellees' brief, the patent was upheld on the ground that the patentee was the first to combine a coiled barb with twisted lengths of wire. This novel arrangement performed two new functions in the art; namely, the preventing of the barbs from turning and the preventing of the barbs from shifting along the strands of twisted wire. In the case at bar, the tongue and groove connecting means of the patent in suit performs no new function with respect to the two rings of the ensemble. It holds them in connected relationship so they do not independently turn or become detached. The connecting means of Thomas, Kaas and Bullard each do the same thing, and the tongue and groove connecting means of the other prior art patents also function in this same manner with respect to the members they join together.

FINDINGS OF FACT 12, 13, 14, 15, 16.

Appellees' argument on pages 15, 16, 17 and 18 of their brief contends that this court is bound by the lower court's findings with respect to patentable nov-

elty, invention and anticipation. As previously discussed in the first part of this reply brief, this court may examine into the recorded prior art to determine whether a patent is valid, notwithstanding a finding by the lower court on this point. In the present case the evidence as represented by the prior art conclusively shows the patent in suit to be anticipated and lacking in patentable novelty. These findings are not supported by the evidence and are clearly erroneous. A full discussion of the grounds supporting this statement is to be found in appellants' opening brief commencing on page 12 under the heading "(a) The Patent in Suit is Anticipated by the Prior Art," and on page 35 under the heading "(c) The Combination of the Patent in Suit Does Not Constitute Invention."

Appellee contends that the patented structure accomplishes a latching of a wedding ring and an engagement ring in a manner substantially different than the prior art and by means substantially different from the prior art, thereby producing the old result in a novel and improved manner. (Finding 12.) Such an assumption is erroneous and this finding has no basis in the evidence in this case. The dovetail tongue and groove connecting means of the patent in suit holds the two rings of the ensemble in connected relationship so they do not turn independently of each other or become detached. This same result is accomplished by the connecting means of Thomas, for instance. There is no difference whatsoever in the results accomplished by the combination of the patent in suit over the results accomplished by the

Thomas, Kaas and Bullard patents. The means employed in latching the two rings of the patent in suit together is substantially the same as the means shown in Thomas. In both instances a lug on the side of one ring fits within a recess in the side of the other ring. There is but a slight change in the shapes of the lugs and recesses, and such change certainly comes under the category of "mechanical skill" rather than invention, especially in view of the teachings of such patents as Hubbard, Mittleburg, etc., which disclose the same type of connecting means. A reading of the decision of the United States Supreme Court in *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U.S. 84, Appellants' Opening Brief, page 16, and this court's decision in *Wilson-Western Supporting Goods Co. v. Barnhart*, 9th C.C.A., 81 F. (2d) 108, 110, Appellants' Opening Brief, page 38, should readily indicate to this court that patentable novelty does not reside in the combination of the patent in suit. Continuing with Finding 12, "and produced the old result in a novel and improved manner," it is to be noted that the result accomplished by the latching together of the rings of the Granat ensemble *is most certainly old*, and that such result is not new or improved. The latching of the two rings together is not novel, nor is the means accomplishing this result new. The result of latching the rings together is not improved or new, since in Thomas, Kaas and Bullard, the same results are performed by substantially the same means.

The ruling in the cited case of *Cantrell v. Wallick*, 117 U.S. 689, is not particularly pertinent here, par-

ticularly since the subject matter of the patent in question is wholly different. In that case the issue was whether an improvement patent having all of the elements of an old patent plus another was valid. Here no such question has been raised and obviously all of the elements of the patent in suit are found in the prior art.

Neither is the case of *Independent Oil Well Cementing Co. v. Halliburton*, 54 F. (2d) 900, particularly in point here. The subject matter of the patents there in suit related to oil well cementing equipment. The following quotation from this case is more in point here than that recited in appellees' brief:

“When the respective individual functions of the elements assembled are not changed and where they produce no result other than the added results of such functions, there is a mere aggregation of elements.”

FINDING NO. 23.

Finding 23 states that defendant Granat Bros. has been damaged in an amount equal to eight per cent (8%) of the retail sales price of the infringing rings manufactured and sold by or for plaintiffs. Conclusion of law No. 6 states that Granat Bros. is entitled to a judgment against plaintiffs in a sum equal to this amount.

Appellants are and have been wholesalers only. They have no control over the retail sales of their merchandise after it is once sold to their customers. The evi-

dence in this case clearly shows that appellants are not engaged in selling ring ensembles in the retail trade. The lower court's conclusion of law and the judgment entered herein requires plaintiffs to account for profits they have not made and from sales over which they have had no control. The ruling of the District Court is clearly erroneous and should be set aside.

PAGES 19 AND 23 OF APPELLEES' BRIEF.

In answering appellees' arguments relating to "Commercial Success" and to "Tribute Paid the Patentee etc.," a most suitable reply is given by this court in *Wilson-Western Sporting Goods Co. v. Barnhart*, 9th Circuit, 81 F. (2d) 108, 111, as follows: .

“ ‘The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement

of the art. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.' *Atlantic Works v. Brady*, 107 U.S. 199,200.

"In the half century since the foregoing decision was rendered, 'the process of development in manufactures' has been greatly accelerated. Hence the Supreme Court's words of warning are applicable with even greater force today than when they were uttered."

CONCLUSION.

It is therefore submitted that the patent in suit is invalid; that the findings of fact supporting the patent are clearly erroneous and should be set aside; and that the judgment of the lower court should be reversed.

Dated, San Francisco, California,

May 2, 1949.

Respectfully submitted,

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Attorney for Appellants.

No. 12,160

IN THE
United States Court of Appeals
For the Ninth Circuit

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GRANAT,

Petitioners-Appellees.

**PETITION FOR A REHEARING ON BEHALF OF APPELLEES,
GRANAT BROS. (A CORPORATION) AND JOSEPH GRANAT.**

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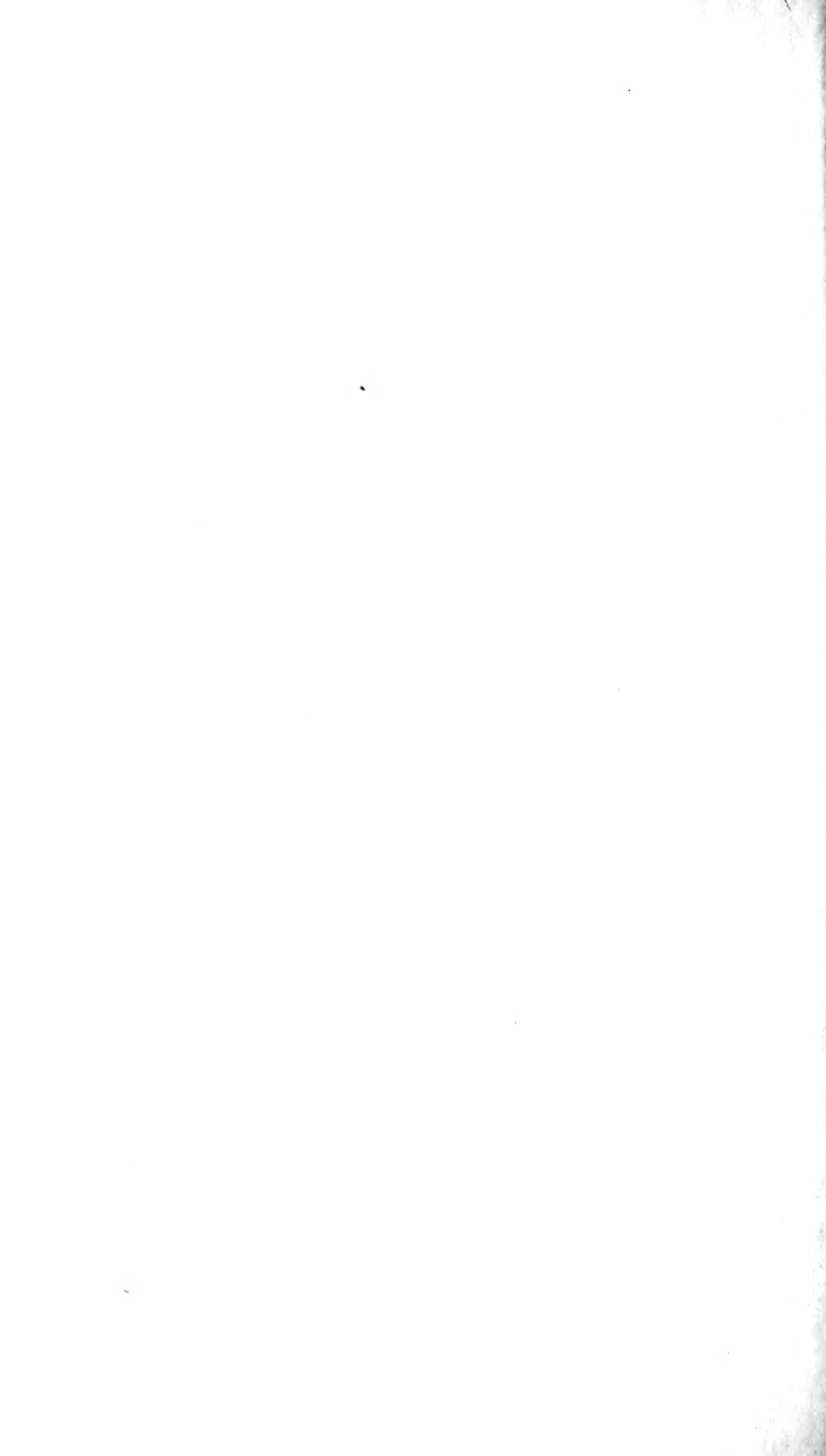
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No. 12,160

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RALPH D. GOMEZ and WILLIAM HENDERSON, as individuals and co-partners doing business under the name of Gomez Manufacturing Company,

Appellants,

vs.

GRANAT BROS. (a corporation) and JOSEPH GRANAT,

Petitioners-Appellees.

**PETITION FOR A REHEARING ON BEHALF OF APPELLEES,
GRANAT BROS. (A CORPORATION) AND JOSEPH GRANAT.**

*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

The appellees, Granat Bros. and Joseph Granat, herein, feeling themselves aggrieved by the opinion filed in this Court on October 20, 1949, come now and respectfully petition this Court for a rehearing. The premise of this petition is that the decision conflicts

with the rule of the cases of *Faulkner v. Gibbs*, decided in this Court October 8, 1948, 170 Fed. (2d) 34, sustained in the Supreme Court of the United States *Faulkner v. Gibbs*, No. 19, decided November 7, 1949, 83 U.S.P.Q. 192; *Ralph N. Brodie Company v. Hydraulic Press Manufacturing Company*, 151 Fed. (2d) 91; *Maulsby v. Conzevoy*, 161 Fed. (2d) 165 (9th Cir.).

As we understand the basis of the decision in the case at bar, it is that the patented device was for an exhausted combination and lacked invention in that interlocking finger rings were old in the ring art and dovetail connections were old in other arts, and that there could be no invention in combining finger rings and dovetail connections to accomplish the improved results flowing from such combination.

In line with this, this Court stated in its opinion:

“Granat did not invent nor discover the finger ring ensemble with interlocking relationship; neither did he invent nor discover the dovetail joint. He used the dovetail joint as a means of interlocking the two rings.”

The Court apparently decided that in order to impart patentable invention to a patentable combination, some one element of the combination must have been new and the result of invention or discovery. To support our interpretation of the Court's decision, we quote from it as follows:

“While the addition of a new element to an old invention may be patentable, such new element must be the result of invention or discovery

as distinguished from the exercise of mechanical skill.”

We respectfully submit that such a ruling is in conflict with the cases above set forth because as held in those cases and in all prior cases the fact that all of the elements of a claimed combination are individually old does not detract from the patentability of the combination if the combination be new. There are numerous decisions to that effect.

“* * * Conceding for the purpose of the argument, *that the elements are all old* and that each element used produces no new result, yet we are convinced that a beneficial result has been produced in a more efficient, economical and facile manner, and we feel constrained to hold the claims valid. *New York Scaffolding Co. v. Whitney*, 8 Cir., 224 F. 452.” (Emphasis ours.)

E. R. Wagner Mfg. Co. v. Porter Steel Specialties, 116 Fed. (2d) 63, 67 (C.C.A. 7, 1940).

“In discussing the validity of the patent in suit, *it may be admitted that all the elements in appellee’s structure were old in the art*. Appellee claims, however, that its structure is a new combination of these elements which produces a novel and useful result (or an old result in a more facile, economical, and efficient way). If this be true, it is sufficient to uphold the patent. *New York Scaffolding Co. v. Whitney* (C.C.A.), 224 F. 452.” (Emphasis ours.)

Young Radiator Co. v. Modine Mfg. Co., 55 Fed. (2d) 545, 546 (C.C.A. 7, 1931). (Re-hearing denied 1932.)

**THE COMBINATION IS NEW IN THE PRIOR ART
AS SHOWN BY THIS RECORD.**

The Court in its opinion, to find lack of novelty, refers to the prior art patents on finger rings which were interlocked in a manner entirely different from that shown in the patent in suit, and then goes into an entirely different art; that is, the machinery art and furniture art, to find the dovetail connection, and then from this mythical combination finds that the combination claimed in the patent is old and unpatentable. We emphasize the fact that the claims are for a combination, as can be determined from the claims themselves, and the Court, in our opinion, is in error when it finds:

“The connecting means is the element which forms the basis of defendants’ claim of invention.”

The basis of the invention is the combination of two finger rings with a particular form of dovetail connection between them so that they may be interlocked, and it is admittedly a new combination.

The Court was in error when it stated:

“In the instant case * * * the dovetail joint was well known to the art.”

There is no showing in this record of the use of a dovetail joint in connection with finger rings, or rings of any character. The prior art patents in the record showing dovetail joints do not relate to the jewelry art, but to entirely different arts, such as the furniture making art and the heavy machinery art.

We urge that there is ample evidence in the record to sustain the proposition, and as found by the District Court, that it required more than the exercise of ordinary mechanical skill to adopt the element old in one art to an entirely new art and entirely new use, to-wit, connecting finger rings.

THE DISTRICT COURT FOUND AS FACT THAT THIS NEW COMBINATION PRODUCED A MORE EFFICIENT AND BETTER RESULT, AND IN THAT THAT FINDING IS NOT CLEARLY ERRONEOUS AND IS AMPLY SUPPORTED IN THE RECORD IT SHOULD NOT BE DISTURBED IN THE ABSENCE OF A SHOWING THAT THE COMBINATION WAS OLD AND EXHAUSTED.

The District Court found as a fact that invention resided in the new combination of elements, and that finding is supported by the tremendous commercial success evidenced by the record of the finger ring ensemble here in issue.

This Court has repeatedly held, and did so recently in the *Faulkner v. Gibbs* case above cited, that the question of whether or not a new and useful combination is the result of mere mechanical skill or mere inventive faculty is one of fact and should not be set aside unless clearly erroneous.

Here the evidence shows, as a comparison of the rings in evidence with the prior art, that the new combination had considerable merit—

(1) it enabled interlocking connections between the rings which did not detract from the symmetrical

Indeed, there are numerous decisions holding that from the fact that the elements of a device are claimed as a combination it may be presumed that each of the elements individually is old in the art.

“The patent being for a combination, and no claim being made for a patent on any one of the elements, it is conclusively presumed either that they were old in the art or not patentable. *Richards v. Chase Elevator Co.*, 159 U.S. 477, 486, 16 S. Ct. 53, 40 L. Ed. 225; *City of St. Louis v. Prendergast*, 29 F. (2d) 188 (C.C.A. 8).”

Harris v. Ladd, 34 Fed. (2d) 761, at 762 (C.C.A. 8, 1929).

Our Supreme Court in the *Faulkner v. Gibbs* case above cited reaffirms this principle:

“* * * In the instant case, the patent has been sustained because of the fact of combination rather than the novelty of any particular element.”

WHERE THE COMBINATION IS MADE UP OF ELEMENTS ALL INDIVIDUALLY OLD IN THE ART, THE COMBINATION IF NEW IS PATENTABLE IF SUCH COMBINATION PRODUCES A USEFUL RESULT OR AN OLD RESULT IN A MORE FACILE, ECONOMICAL AND EFFICIENT WAY.

The above premise has been laid down in numerous decisions, including decisions of this Court.

Willard v. Union Tool Company, 253 Fed. 48.

Other authorities on this point are as follows:

“* * * So, a new combination of known devices, whereby the effectiveness of a machine is increased, may be the subject of a patent * * *.”

Cantrell v. Wallick, 117 U.S. 689, 29 L. Ed. 1017, at 1018 (1886).

“With respect to the result produced, it is not essential that it be a wholly new result, but it is sufficient if an old result is effected in a more facile, economical, or efficient way. *Galvin Elec. Mfg. Co. v. Emerson Elec. Mfg. Co.* (C.C.A. 8), 19 F. (2d) 885, 888; *Ottunwa Box Car Loader Co. v. Christy Box Car Loader Co.* (C.C.A. 8), 215 F. 362, 369; *New York Scaffolding Co. v. Whitney* (C.C.A. 8), 224 F. 452, 456; *National Hollow Brake-Beam Co. v. Interchangeable B.-B. Co.* (C.C.A. 8), 106 F. 693, 706, 707; *Skinner Bros. Belting Co. v. Oil Well Imp. Co.* (C.C.A. 10), 54 F. (2d) 896; *Grinnel Washington Mach. Co. v. E. E. Johnson Co.*, 247 U.S. 426, 432, 38 S. Ct. 547, 62 L. Ed. 1196.”

Independent Oil Well Cementing Co. v. Halliburton, 54 F. (2d) 900, 905 (C.C.A. 10, 1932), (cert. denied 286 U.S. 544, 76 L. Ed. 1281).

“The result need not be new. It is sufficient if an old result be produced in a more facile, economic or efficient way. *Willard v. Union Tool Company*, 9 Cir., 253 F. 48; *New York Scaffolding Co. v. Whitney*, 8 Cir., 224 F. 452.”

Long v. Dick, 38 Fed. Supp. 214, 220 (Calif. D.C. 1941).

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AS SHOWN BY THIS RECORD.**

The Court in its opinion, to find lack of novelty, refers to the prior art patents on finger rings which were interlocked in a manner entirely different from that shown in the patent in suit, and then goes into an entirely different art; that is, the machinery art and furniture art, to find the dovetail connection, and then from this mythical combination finds that the combination claimed in the patent is old and unpatentable. We emphasize the fact that the claims are for a combination, as can be determined from the claims themselves, and the Court, in our opinion, is in error when it finds:

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The basis of the invention is the combination of two finger rings with a particular form of dovetail connection between them so that they may be interlocked, and it is admittedly a new combination.

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There is no showing in this record of the use of a dovetail joint in connection with finger rings, or rings of any character. The prior art patents in the record showing dovetail joints do not relate to the jewelry art, but to entirely different arts, such as the furniture making art and the heavy machinery art.

We urge that there is ample evidence in the record to sustain the proposition, and as found by the District Court, that it required more than the exercise of ordinary mechanical skill to adopt the element old in one art to an entirely new art and entirely new use, to-wit, connecting finger rings.

THE DISTRICT COURT FOUND AS FACT THAT THIS NEW COMBINATION PRODUCED A MORE EFFICIENT AND BETTER RESULT, AND IN THAT THAT FINDING IS NOT CLEARLY ERRONEOUS AND IS AMPLY SUPPORTED IN THE RECORD IT SHOULD NOT BE DISTURBED IN THE ABSENCE OF A SHOWING THAT THE COMBINATION WAS OLD AND EXHAUSTED.

The District Court found as a fact that invention resided in the new combination of elements, and that finding is supported by the tremendous commercial success evidenced by the record of the finger ring ensemble here in issue.

This Court has repeatedly held, and did so recently in the *Faulkner v. Gibbs* case above cited, that the question of whether or not a new and useful combination is the result of mere mechanical skill or mere inventive faculty is one of fact and should not be set aside unless clearly erroneous.

Here the evidence shows, as a comparison of the rings in evidence with the prior art, that the new combination had considerable merit—

(1) it enabled interlocking connections between the rings which did not detract from the symmetrical

design of the rings, or from their appearance when worn separately;

(2) it enabled the rings to be connected and disconnected when on the finger, as can be clearly demonstrated from the rings in evidence;

(3) it enabled the rings to be connected by feel alone, which is important because the interlocking connections must necessarily be minute dimensions.

No one of the prior art rings has or suggests these features.

We, therefore, respectfully urge that the District Court having found as facts, which findings are based on substantial evidence and are not clearly erroneous, that

(1) the combination was new;

(2) the combination was the result of invention;
and

(3) the prior art patents did not anticipate the subject matter of the patent in suit,
they should not be disturbed in light of the authorities heretofore cited.

We, therefore, respectfully submit to the Court that its former opinion in this case is in error in the particulars above noted and in conflict with the authorities on those points laid down by this Court, and that this petition for rehearing should be granted in order that the circumstances of this case and the conflict between the opinion in this case and prior

opinions may be more fully presented to this Court for the benefit of the aggrieved parties hereto as well as in the interest of uniformity.

Dated, San Francisco, California,
November 16, 1949.

Respectfully submitted,

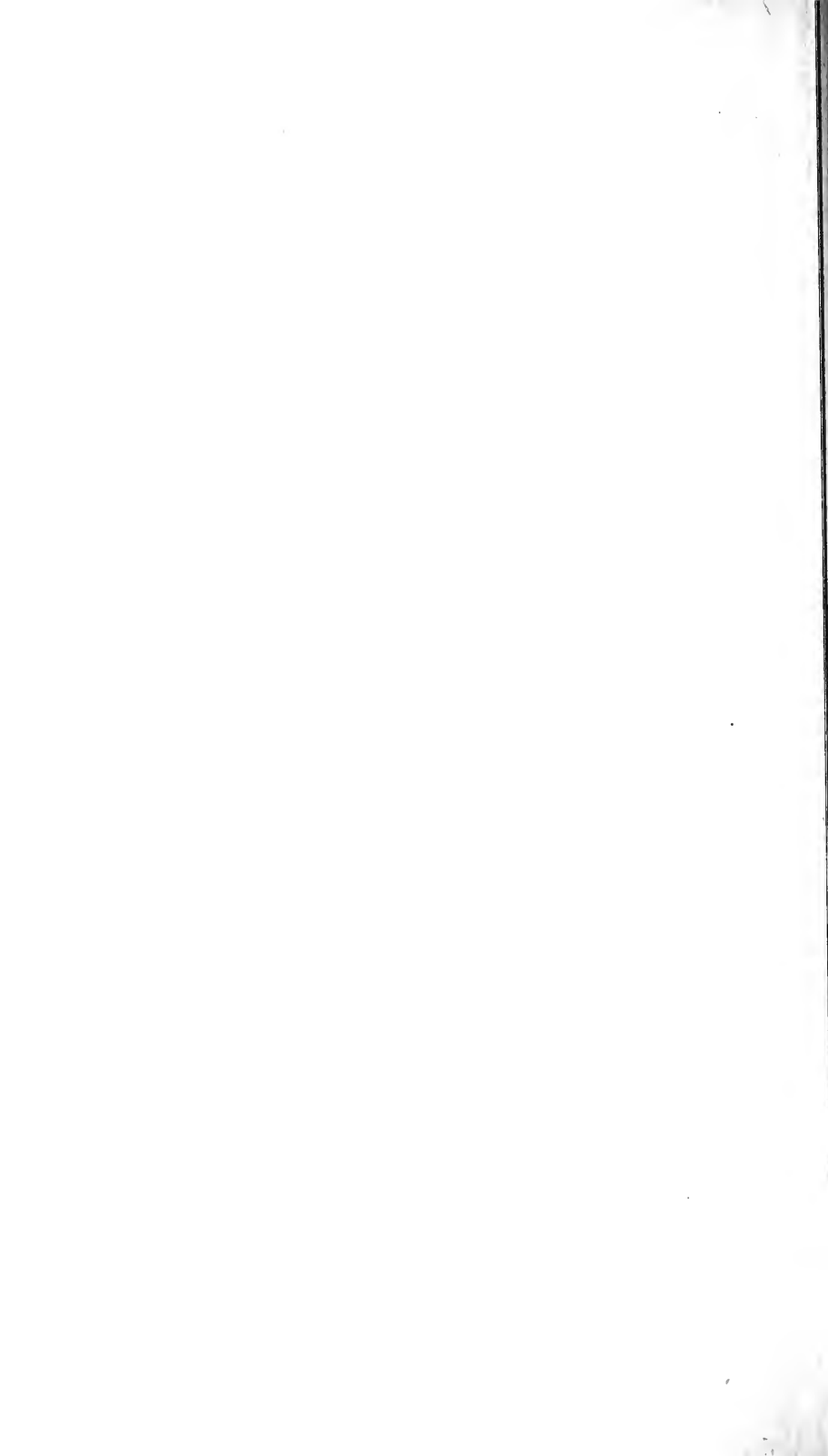
MELLIN AND HANSCOM,

OSCAR A. MELLIN,

LEROY HANSCOM,

JACK E. HURSH,

Attorneys for Petitioners-Appellees.

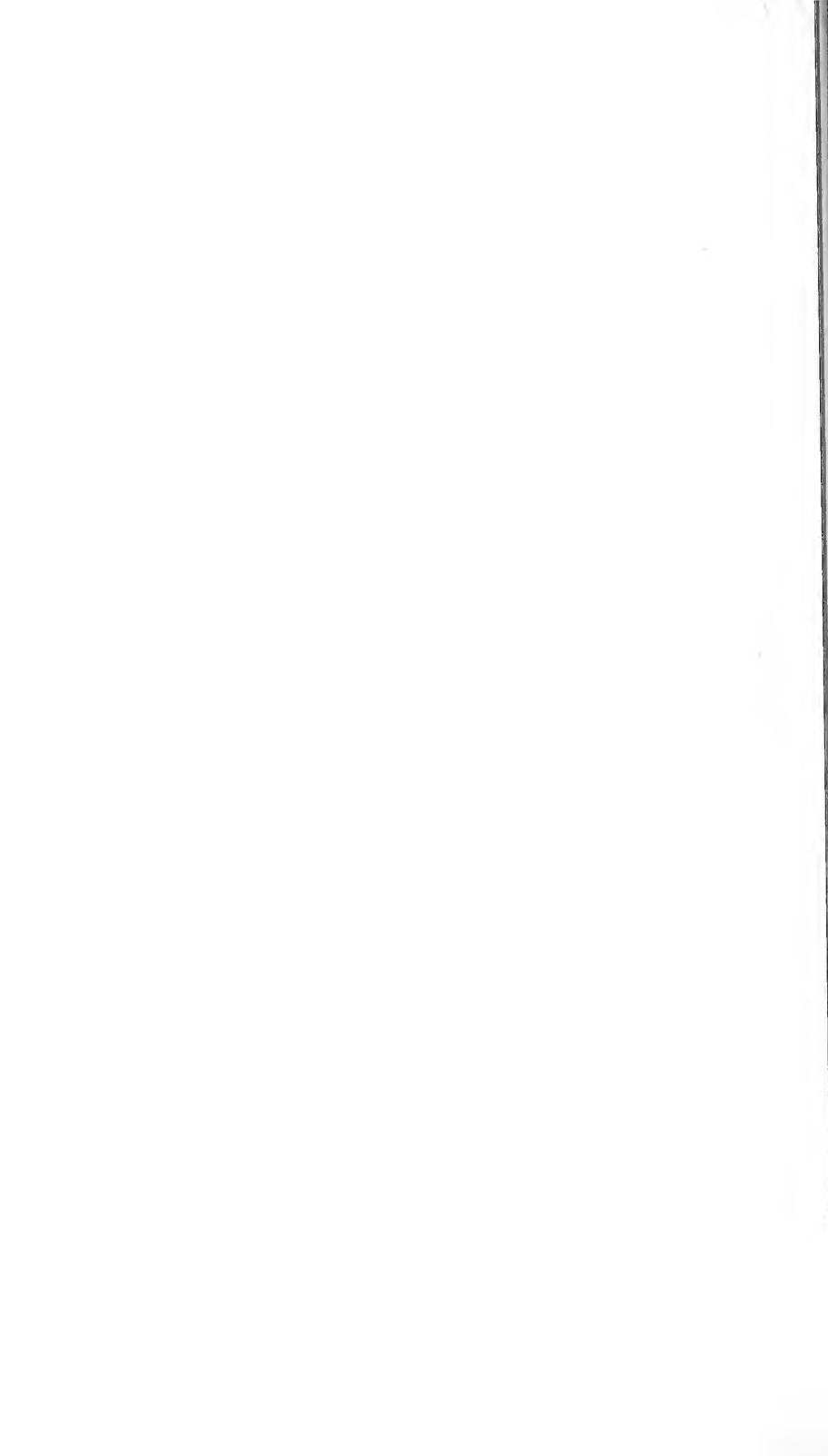


CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for a rehearing is not interposed for delay, and that in my judgment the same is well founded.

Dated, San Francisco, California,
November 16, 1949.

OSCAR A. MELLIN,
Attorney for Petitioners-Appellees.



No. 12162

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

VS.

RAYMOND DOWNUM and EDNA DOWNUM,
husband and wife,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Idaho, Northern Division

FILED
MAR 28 1949

PAUL P. O'BRIEN,
CLERK



No. 12162

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
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NAMES AND ADDRESSES OF ATTORNEYS
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Attorneys for Appellees. [2*]

* Page numbering appearing at foot of page of original certified
Transcript of Record.

In the District Court of the United States
for the District of Idaho,

Northern Division

No. 1709

RAYMOND DOWNUM and EDNA DOWNUM,
husband and wife,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Plaintiffs complain and for cause of action allege:

I.

That at all times herein mentioned the plaintiffs were and now are husband and wife and as such constitute a community under the laws of the State of Idaho.

II.

That they are citizens of the State of Idaho, residing at Bonners Ferry, Boundary County, State of Idaho.

III.

That this action is brought and maintained under and by virtue of 28 U.S.C.A. (Supp) 931.

IV.

That on or about the 14th day of May, 1947, plaintiff, Raymond Downum was driving a Model A Ford truck owned by the plaintiffs over and along a county road, two and one-half miles west of the

town of Bonners Ferry, Idaho, between the hours of 1:00 and 2:00 o'clock in the afternoon, driving in an easterly direction. That at said time and place one Corporal Clyde W. Smith, for the use and benefit and under the direction of the defendant, was driving a one and one-half ton dump truck owned by the defendant in a westerly direction over and along said road approaching the vehicle then and there being driven by the plaintiff. That said Corporal Smith did then and there drive said dump truck in a [3] careless and negligent manner and as a direct and proximate result of such carelessness and negligence, it collided with the truck of plaintiffs with great force and violence causing physical injury to plaintiff, Raymond Downum, and the destruction of plaintiffs' truck, as hereinafter more particularly alleged.

V.

That immediately prior to the collision hereinabove alleged, plaintiff Raymond Downum was a strong, healthy, able-bodied man, aged 35 years. That immediately after said collision and as a result of the carelessness and negligence with which the defendant is chargeable, said plaintiff became sick, sore, and disordered, and shall remain so for the remainder of his natural life, which according to the American Mortality Table is 31 years. Said plaintiff sustained a terrific shock to his entire nervous system; the nerves, muscles and tendons and soft tissue generally was bruised and damaged. He sustained numerous comminuted fractures to the bones of his face; a fracture of his nose; a cranial

nerve injury essential to sight producing diplopia; disfiguration and permanent scars on his face, particularly in the region of his left eye and nose; impairment of the tear duct of his left eye; damaged nerves in his right shoulder occasioning a marked weakness and atrophy in his right hand; comminuted fractures of the shafts of the right and left femurs; a fracture of the right patella. That said plaintiff's injuries were such as to cause him to suffer excruciating pain, that he presently is suffering from pain and will continue to suffer from pain and discomfort for the rest of his natural life. That prior to the sustenance of his injuries he was gainfully employed earning and capable of earning \$10.00 per day. That he will never be able to work under any circumstances requiring manual effort on his part, and that he is untrained for any [4] employment except manual labor, all to plaintiffs damage in the sum of \$100,000.00.

VI.

That plaintiff required and needed the attention and services of physicians and surgeons and became obligated therefor in the sum of \$1,085.00, which said sum is reasonable taking into consideration the kind, character and amount of such services. That plaintiff will require additional services of physicians and surgeons in an amount not presently known or ascertainable which he alleges to be in the sum of \$500.00, all to plaintiffs damage in the sum of \$1,585.00.

VII.

That said plaintiff required hospitalization and was confined thereto from the 14th day of May,

1947, until the 23rd day of December, 1947, and became obligated for such services in the sum of \$2,112.00 which said sum is reasonable in amount, taking into consideration the kind, character and amount of such services. That the plaintiff will require additional hospitalization in connection with corrective surgery required, the amount of which is not presently known or ascertainable, but which he alleges to be in the sum of \$500.00, all to plaintiffs damage in the sum of \$2,612.00.

VIII.

That said plaintiff required ambulance service, special nurses, and special surgical equipment and became obligated therefor in a total sum of \$126.88, which said sum is reasonable in amount, taking into consideration the kind, character and nature of such services and equipment, to plaintiffs damage in the sum of \$126.88.

IX.

That immediately prior to the collision hereinabove alleged, plaintiffs' truck was of the reasonable value of \$150.00 and that immediately after the collision said truck [5] had no value whatever, having been completely destroyed, all to plaintiffs damage in the sum of \$150.00.

Wherefore plaintiffs pray judgment against the defendant in the total sum of \$104,473.88, and for their costs and disbursements herein expended.

W. J. NIXON,

GEO. W. YOUNG,

Attorneys for Plaintiffs.

(Duly verified.)

[Endorsed]: Filed Feb. 24, 1948. [6]

[Title of District Court and Cause.]

INTERROGATORIES TO ADVERSE PARTY

The defendant requests each of the plaintiffs' answer under oath, in accordance with Rule 33 of the Federal Rule of Civil Procedure, to the following interrogatories:—

1.

What is the present address of the Clyde W. Smith named in paragraph 4 of the Complaint?

2.

What is the name and the address of the officer to whom you made the report of the accident described in your Complaint?

3.

Will you contend in the trial of this action that on May 14, 1947, Clyde W. Smith was a corporal in the armed forces of the United States?

4.

If your answer to question No. 3 is in the affirmative, will you contend at the time of the trial that at the time of the accident alleged in your Complaint, Clyde W. Smith was acting in line of duty?

5.

If your answer to question No. 4 is in the affirmative,

(a) What were his duties in line of duty at the time of the accident?

(b) What duties was he actually performing at the time of the accident?

6.

If your answer to question No. 4 is in the affirmative,

(a) Under what orders was he acting? [7]

(b) The name and address of the person who gave those orders.

7.

If your answer to question No. 3 is in the negative,

(a) In what capacity was Clyde W. Smith employed by the United States?

(b) What were his duties in respect to that employment?

(c) What duties was he actually performing at the time of the accident alleged in the Complaint?

8.

If your answer to question No. 3 is in the negative,

(a) Under what orders was Clyde W. Smith acting?

(b) The name and the address of the person who gave those orders.

9.

What was the point of departure and the point of destination of the truck driven by Clyde W. Smith on the trip of May 14, 1947, during which the accident occurred?

10.

Was the truck driven by Clyde W. Smith empty at the time of the accident?

11.

If your answer to question No. 9 is in the negative,

- (a) With what was the truck loaded?
- (b) Who owned the load?
- (c) Where did the load come from?
- (d) Where was the load going?
- (e) Who was paying for the delivery of the load?

12.

Was anyone riding in the truck with Clyde W. Smith, and if your answer is in the affirmative, give the name and the address of that person or those persons. [8]

13.

Who owned the truck driven by Clyde W. Smith on May 14, 1947?

14.

What was the point of departure and the point of destination of the truck driven by the plaintiffs on May 14, 1947, on the trip during which the accident occurred?

15.

Was the truck driven by the plaintiffs empty at the time of the accident?

16.

Who, if anyone, was with the plaintiffs in their truck at the time of the accident, and if anyone, give the name and the address of that person or those persons.

17.

What license number was on the truck driven by the plaintiffs at the time of the accident?

18.

Who was driving the plaintiffs' truck at the time of the accident and what was the number of the driver's license?

19.

Was the truck driven by Clyde W. Smith approaching plaintiffs' truck head-on or overtaking it from the rear?

20.

In what direction was the plaintiffs' truck proceeding and in what direction was the truck driven by Clyde W. Smith proceeding?

21.

Where, with reference to the center line of the road, did the accident occur?

22.

On which side of the center line of the road was the plaintiffs' truck at the time of the impact? [9]

23.

On which side of the center line of the road was the truck driven by Clyde W. Smith at the time of the impact?

24.

What part of the plaintiffs' truck was struck by what part of the truck driven by Mr. Smith?

25.

After the impact,

(a) How far did plaintiffs' truck travel?

(b) How far did the truck driven by Mr. Smith travel?

26.

Have you sold your truck since the accident, and, if so, the name and address of the purchaser and the amount received for the sale?

27.

Were any pictures taken of the trucks before they were removed, and, if so, what is the name and the address of the person who took the pictures and the name and the address of the person who has the pictures at this time?

28.

What is the name and the address of each doctor you will call to testify for the plaintiffs at the trial of this case?

29.

What is the name and the address of each doctor who attended the plaintiff at the time of and subsequent to the accident?

30.

Has Raymond Downum had the attention of any doctor for any reason whatever within five years prior to May 14, 1947, and, if so, give the name and address of each attending doctor? [10]

31.

If your answer to question No. 30 is in the affirmative, then state the complaints you gave each doctor or the purpose for which you sought medical attention.

32.

Were any X-rays taken to show the physical condition of Raymond Downum after the accident, and, if so, give the name and the address of the doctor who took or caused the pictures to be taken.

33.

Name the employments in which Raymond Downum has been engaged during the five years prior to May 14, 1947.

34.

Give the name and address of each employer.

35.

What has been the gross earnings of Raymond Downum during each of the five years immediately preceding May 14, 1947?

36.

In what gainful activities has Raymond Downum engaged since May 14, 1947?

37.

What education has Raymond Downum had and where was it had?

38.

What is the name and the location of each hospital in which Raymond Downum has been since May 14, 1947?

39.

What is the name and the location of each hospital in which Raymond Downum has received any treatment during the five years immediately preceding May 14, 1947?

40.

What is the name and the address of the person who furnished ambulance service alleged in the Complaint, and state where Raymond Downum was picked up by the ambulance [11] and the place to which he was delivered?

41.

What is the trade name, the body type, the model, and the year of manufacture of plaintiffs' truck?

42.

What particular acts of negligence on the part of Mr. Smith will you rely at the time of the trial?

43.

What particular acts of carelessness on the part of Mr. Smith will you rely at the time of the trial?

44.

Do you know of any other acts of negligence or carelessness, either of commission or omission, on the part of Clyde W. Smith on May 14, 1947, at the time of the accident?

JOHN A. CARVER,

United States Attorney for the District of Idaho.

E. H. CASTERLIN,

Assistant U. S. Attorney for the District of Idaho,
Boise, Idaho.

Attorneys for defendant.

(Certificate of service attached.)

[Endorsed]: Filed March 26, 1948. [12]

[Title of District Court and Cause.]

ANSWER

Answering plaintiffs' Complaint, the defendant

I.

Admits the allegations of paragraphs 1, 2, and 3.

II.

Alleges that it has no information, knowledge, or belief respecting the allegations of paragraphs 4, 5, 6, 7, 8, and 9, and on such ground, denies the same.

JOHN A. CARVER,

United States Attorney for the District of Idaho,

E. H. CASTERLIN,

Assistant U. S. Attorney for the District of Idaho.

(Certificate of service attached.)

[Endorsed]: Filed April 20, 1948. [13]

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES

PROPOUNDED BY DEFENDANT

Answer to Interrogatory 1—The present address of Clyde W. Smith named in paragraph 4 of the complaint, is not known to plaintiffs.

Answer to Interrogatory 2—Joseph E. Cahill, 1st Lt., Air Corps, Claims Officer, Hqs., Spokane Army Air Field, Spokane, Washington.

Answer to Interrogatory 3—Plaintiffs' contention shall be that Clyde W. Smith was a member

of the U. S. Army and on information and belief, they will contend that he had the rank of corporal.

Answer to Interrogatory 4—Yes.

Answer to Interrogatory 5—(a) Student truck driver; (b) driving a dump truck.

Answer to Interrogatory 6—(a) Do not know; (b) Plaintiffs' information is to the effect that the superior officer in charge of operations in which said Clyde W. Smith was engaged was Capt. Ray D. Besing.

Answer to Interrogatory 7—(a)-(b)-(c) Interrogatory 3 was answered in the affirmative; therefore we conceive no answer is required.

Answer to Interrogatory 8—We conceive no answer is required.

Answer to Interrogatory 9—Plaintiffs are informed that the point of departure [14] was the hill above the grade school in Bonners Ferry and the destination was Drainage District No. 1.

Answer to Interrogatory 10—No.

Answer to Interrogatory 11—(a) Dirt; (b) On the basis of possession, these parties would answer that the U. S. Army owned the load; (c) Grade school hill; (d) Drainage District No. 1; (e) U. S. Army.

Answer to Interrogatory 12—No.

Answer to Interrogatory 13—U. S. Army.

Answer to Interrogatory 14—From Drainage District No. 7 to plaintiffs' home in Bonners Ferry.

Answer to Interrogatory 15—Yes.

Answer to Interrogatory 16—No one.

Answer to Interrogatory 17—9B251-Idaho.

Answer to Interrogatory 18—Plaintiff Raymond Downum was driving. His driver's license was Idaho 114507.

Answer to Interrogatory 19—Head-on.

Answer to Interrogatory 20—Plaintiffs' truck was proceeding generally east, and truck driven by Clyde W. Smith was proceeding generally west.

Answer to Interrogatory 21—South.

Answer to Interrogatory 22—South.

Answer to Interrogatory 23—South.

Answer to Interrogatory 24—Front of both. [15]

Answer to Interrogatory 25—(a) None, may have been knocked a few feet backwards; (b) Do not know.

Answer to Interrogatory 26—No.

Answer to Interrogatory 27—Les Beck, Bonners Ferry, Idaho, is reported to have said he took pictures before trucks were removed.

Answer to Interrogatory 28—Dr. Fredrick W. Durose, Bonners Ferry, Idaho; Dr. William E. Grieve, Paulsen Medical & Dental Bldg., Spokane, Washington; Dr. Joseph W. Lynch, Paulsen Medical & Dental Bldg., Spokane, Washington; Dr. Robert L. Pohl, Paulsen Medical & Dental Bldg., Spokane, Washington.

Answer to Interrogatory 29—Same as those listed in the answer immediately above.

Answer to Interrogatory 30—Dr. R. M. Bowell, Bonners Ferry, Idaho.

Answer to Interrogatory 31—Indigestion.

Answer to Interrogatory 32—Yes, Dr. Durose, Dr. Greive and Dr. Pohl.

Answer to Interrogatory 33—Farming for himself.

Answer to Interrogatory 34—Self.

Answer to Interrogatory 35—1942, \$3039.22; 1943, \$3696.73; 1944, \$4104.12; 1945, \$4469.51; 1946, \$5007.50. In addition to these amounts, plaintiffs estimate they earned an additional \$525.00 per year from use of milk, butter, eggs, etc., and an additional \$150.00 per year for wood taken from the ranch.

In 1947 plaintiffs sold their ranch which they had purchased in 1940 and realized a capital gain on the land and livestock of \$6382.18.

Answer to Interrogatory 36—None. [16]

Answer to Interrogatory 37—8th Grade, Bentonville, Arkansas.

Answer to Interrogatory 38—Bonners Ferry Hospital, Bonners Ferry, Idaho, and Sacred Heart Hospital, Spokane, Washington.

Answer to Interrogatory 39—None.

Answer to Interrogatory 40—Frank Morse, Bonners Ferry, Idaho. From scene of accident to Bonners Ferry Hospital, and from Bonners Ferry Hospital to Sacred Heart Hospital in Spokane.

Answer to Interrogatory 41—1930 Model A. Ford flat bed, 1 ton.

Answer to Interrogatory 42—Smith was driving on the wrong side of the road. He was driving at a speed greater than he should have been, to-wit: about 35 miles per hour traveling in a dust cloud which obscured his vision; that he failed to observe plaintiffs' truck; that he failed to apply his brakes or steer his vehicle away from the vehicle

of the plaintiff which was as far on the right-hand side (south) of the highway as was possible for plaintiffs' vehicle to be.

Answer to Interrogatory 43—See answer to Interrogatory 42.

Answer to Interrogatory 44—None presently within the knowledge of plaintiffs.

(Duly verified.)

RAYMOND DOWNUM.

[Endorsed]: Filed April 21, 1948. [17]

[Title of District Court and Cause.]

MINUTES OF THE COURT

June 10, 1948

This cause came on regularly for trial before the Court sitting without a jury, Messrs. W. J. Nixon and George W. Young appearing as counsel for the plaintiffs; and E. H. Casterlin, Assistant District Attorney, appearing as counsel for the defendant.

After a statement of plaintiffs' cause of action by their counsel, Joseph A. Cahill, Earl Whitbick, Roy Beam, Wallace Davidson, Irby Walter, Dayton Douglas, Raymond Downum, Dr. Fredrick Durose, Wr. William E. Grieve, and Dr. Robert L. Pohl were sworn and examined as witnesses, and other evidence was introduced, on the part of the plaintiffs. [18]

[Title of District Court and Cause.]

MINUTES OF THE COURT

June 11, 1948

This cause came on for further trial before the Court, counsel for the respective parties being present.

Whereupon, Raymond Downum and Edna Downum were sworn and examined, and other evidence was introduced on the part of the plaintiffs, and here the plaintiffs rest.

Dr. Alexander Barclay, Jr., was sworn and examined as a witness on the part of the defendant, and here the defendant rests. And both sides close.

At the conclusion of the trial the Court announced: I find for the plaintiffs, \$3,000 for disability the first year; \$58,500 general damages, including future expenses; and \$3,473.88 specific expenses. The Court further announced he would allow counsel \$12,000 attorneys' fees; and ordered counsel to prepare Findings of Fact and Conclusions of Law, and Judgment and present them for approval of the Court. [19]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came regularly on for trial before the undersigned judge of the above-entitled court sitting without a jury at Coeur d'Alene, Idaho, on the 10th day of June, 1948. The plaintiffs appeared in person and were represented by their counsel, W. J. Nixon and Geo. W. Young. The defendant was represented by John A. Carver, United States Attorney for the District of Idaho and E. H. Cas-terlin, Assistant United States Attorney for the District of Idaho. Testimony was taken and documents were offered and received in evidence, from which are made the following,

FINDINGS OF FACT

1. That the plaintiffs at the times mentioned were husband and wife, constituting a community under the laws of the State of Idaho.

2. That they are citizens of the State of Idaho, residing at Bonners Ferry, Boundary County, Idaho.

3. That this action is brought and properly maintained under and by virtue of 28 U.S.C.A. (Supp.) Sec. 931.

4. That on or about the 14th day of May, 1947, plaintiff, Raymond Downum, was driving a Model A Ford truck owned by the plaintiffs over and along a county road, two and one-half miles west of the town of Bonners Ferry, Idaho, between the

hours of 1:00 and 2:00 o'clock in the afternoon, driving in an easterly direction. That at said time and place one Corporal Clyde W. Smith, for the use and benefit and under the direction of the defendant, was driving a one and one-half ton dump truck owned by the defendant in a westerly direction over and along said road approaching the vehicle then and there being driven by the plaintiff. That said Corporal Smith [20] did then and there drive said dump truck in a careless and negligent manner and as a direct and proximate result of such carelessness and negligence, it collided with the truck of plaintiffs with great force and violence causing physical injury to plaintiff, Raymond Downum, and the destruction of plaintiffs' truck, as hereinafter more particularly found.

5. That the negligence of said Corporal Smith, driver of said truck, consisted of his driving the same on the wrong side of the roadway directly in the path of the plaintiffs' truck, without excuse or cause therefor proximately occasioning the collision between said vehicles and as a proximate result therefrom the plaintiffs sustained damage.

6. That immediately prior to the collision of said vehicles, plaintiff Raymond Downum was a strong, healthy, able-bodied man, aged thirty-five years. That immediately after said collision and as a result therefrom, said plaintiff became sick, sore and disordered, and shall remain so for the remainder of his natural life, which, according to the American Mortality Table is thirty-one years.

That said plaintiff sustained a terrific shock to his entire nervous system; the nerves, muscles, ten-

dons and soft tissue generally was bruised and damaged.

That he sustained numerous comminuted fractures to the bones of his face, a fracture of his nose, a cranial nerve injury essential to sight, occasioning him to suffer permanently from diplopia, disfiguration and permanent scars on his face in the region of his left eye and nose, impairment of the tear duct of his left eye, damaged nerves in his right shoulder occasioning a marked weakness and atrophy in his right hand, diminishing normal functional use thereof, comminuted fractures of the shafts of the right and left femurs, a fracture of the right patella. [21]

That said plaintiff's injuries were such as to cause him to suffer excruciating pain; that he is presently suffering from pain and will in all reasonable certainty continue to suffer from pain and discomfort for the rest of his natural life.

That said plaintiff was totally incapacitated for all purposes for a period of one year following his injuries. That at the time of trial he was incapacitated for all purposes to an extent of from seventy-five to eighty per cent of total disability. That in all reasonable certainty he will be totally incapacitated for all purposes for the remainder of his natural life in a degree of at least sixty per cent.

7. That for a period of five years prior to his injury, the plaintiff, Raymond Downum, earned an income averaging in excess of \$4,000.00 per annum. That at the time of his injury and for some months prior thereto the said plaintiff was gainfully employed and was earning \$10.00 per day. That it

would appear from all of the evidence that said plaintiff was capable of earning at least \$3,000.00 per annum.

8. That the plaintiffs sustained special damages for damage to truck, hospital and medical care, including ambulance service and special nursing in the sum of \$3,473.88.

9. That said plaintiffs sustained a loss of \$3,000.00 in earnings for the first twelve months following the injury of said plaintiff, Raymond Downum.

10. That the plaintiffs will in the future sustain a general loss in earnings as a proximate result of said injuries in an amount found by the Court to be \$58,500.00.

11. That the plaintiffs required the services of attorneys and counselors at law for the preparation and maintenance of this action, and the Court finds \$12,000.00 is a reasonable amount to allow said attorneys for their services, [22] which sum shall be paid out of, but not in addition to the total amount herein found to be due the plaintiffs.

Done in open Court this 21st day of June, 1948.

CHASE A. CLARK,

Judge.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. That the plaintiffs should have and recover judgment of and from the defendant in the total sum of \$64,973.88.

2. That the sum of \$12,000.00 should be allowed W. J. Nixon and Geo. W. Young as and for at-

torneys fees, said sum to be paid out of but not in addition to the total amount hereinabove found to be due the plaintiffs.

3. That the plaintiffs should have and recover costs against the defendant.

Done in open Court this 21st day of June, 1948.

CHASE A. CLARK,
Judge.

[Endorsed]: Filed June 22, 1948. [23]

In the District Court of the United States for the
District of Idaho Northern Division

No. 1709

RAYMOND DOWNUM and EDNA DOWNUM,
husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This case came regularly on for trial before the undersigned judge of the above-entitled court sitting without a jury at Coeur d'Alene, Idaho, on the 10th day of June, 1948. The plaintiffs appeared in person and were represented by their counsel, W. J. Nixon and Geo. W. Young. The defendant was represented by John A. Carver, United States Attorney for the District of Idaho, and E. H. Casterlin, Assistant United States Attorney for the District of Idaho. Testimony was taken and documents were

offered and received in evidence, from which the Court has heretofore made its Findings of Fact and Conclusions of Law, and being fully advised in the premises, does

Order, Adjudge and Decree that the plaintiffs have and recover judgment of and from the defendant in the total sum of \$64,973.88; and does further

Order, Adjudge and Decree that the sum of \$12,000.00 be and the same hereby is allowed W. J. Nixon and Geo. W. Young as and for attorneys fees, said sum to be paid out of but not in addition to the total amount hereinabove adjudged to be due the plaintiffs; and does further

Order, Adjudge and Decree that the plaintiffs have and recover costs against the defendant.

Done in open Court this 21st day of June, 1948.

CHASE A. CLARK,
Judge.

[Endorsed]: Filed June 22, 1948. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment made and entered herein on June 22, 1948.

JOHN A. CARVER,

United States Attorney for
the District of Idaho,

E. H. CASTERLIN,

Assistant U. S. Attorney for
the District of Idaho,
Attorneys for appellant. [25]

[Endorsed]: Filed Aug. 19, 1948.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME FOR FILING RECORD AND DOCKETING APPEAL

The United States of America, the Appellant, shows to the Court as follows:

I.

Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit was filed herein on August 19, 1948.

II.

The Notice of Appeal was filed for the purpose of protecting the interests of the United States until the Attorney General could determine if the

III.

appeal is to be perfected or dismissed.

The Attorney General has not advised this office of its decision and the time for docketing in the Circuit Court will expire on September 28, 1948.

Wherefore, appellant moves the Court for an order extending the time within which the record on appeal may be filed and the appeal docketed in the Circuit Court of Appeals until November 22, 1948.

/s/ JOHN A. CARVER,

United States Attorney for the
District of Idaho.

/s/ PAUL S. BOYD,

Assistant United States Attorney for the
District of Idaho.

ORDER

Upon motion of the appellant, good cause appearing therefor,

It is ordered that the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to the 22 day of November, 1948.

Dated this 22 day of September, 1948.

CHASE A. CLARK,
District Judge.

1 [Endorsed]: Filed Sept. 23, 1948. [27]

[Title of District Court and Cause.]

MOTION FOR ORDER AMENDING AND CORRECTING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT.

Comes now the defendant and moves the court for an order amending and correcting the Findings of Fact and Conclusions of Law and the Judgment heretofore entered in this matter and represents to the Court:

I.

That a mistake has been made in computing the amount awarded for the general damages assessed by the Court in this matter.

II.

That the Court, in computing said award for the general damages assessed improperly, included costs, charges and other factors in computing said award, and all that the plaintiff is entitled to recover is a sum which takes into account the probable future expectation of earnings and to receive that sum discounted for present payment.

III.

That the cost of an annuity sufficient to enable the plaintiff to recover or produce an income equal to the plaintiff's earning capacity with his disability for his life expectancy, as set forth in the Findings of Fact and Conclusions of Law, and to receive that sum discounted for present payment, is approximately \$36,000.00, and not \$58,500.00 as erroneously found by the Court.

Wherefore, defendant prays that the Court amend its Findings of Fact and Conclusions of Law and the Judgment in harmony with the law and the fact. [28]

JOHN A. CARVER,

United States Attorney for the
District of Idaho.

PAUL S. BOYD,

Assistant United States Attorney for the
District of Idaho.

(Affidavit of Service attached.)

[Endorsed]: Filed Sept. 29, 1948. [29]

[Title of District Court and Cause.]

MOTION TO STRIKE OR IN THE ALTERNATIVE TO AMEND FINDINGS OF FACT.

Come now the above named plaintiffs and move the court for an order striking the Motion for Order Amending and Correcting Findings of Fact, Conclusions of Law, and Judgment herein.

This motion is based upon all of the records and files herein and upon Rule 59 of the Federal Rules of Civil Procedure.

In the event that this motion is denied, and in that event only, then plaintiffs move the Court for an order amending Finding of Fact No. 6 which presently states that the plaintiff, Raymond Downum, has a life expectancy of 31 years, to state that

the plaintiff has a life expectancy of 39 years according to the Mortality Table contained in the World Almanac and Book of Facts for 1948, p. 449.

GEO. W. YOUNG,

W. J. NIXON,

Attorneys for the Plaintiffs.

(Certificate of Service attached.)

[Endorsed]: Filed Oct. 18, 1948. [30]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF

October 18, 1948

This cause came on regularly in open court on defendant's Motion for Order Amending and Correcting Findings of Fact and Conclusions of Law and Judgment, and plaintiffs' Motion to Strike or in the Alternative to Amend Findings of Fact.

At the conclusion of argument by respective counsel, the Court announced that the Motion to Correct Findings, etc., will be sustained. Counsel for plaintiffs was instructed to redraw Findings in accordance with the Court's oral opinion.

The Motion of plaintiffs to correct Findings in regard to the life expectancy will be denied.

On motion of counsel for plaintiffs, the Court ordered the record to show that counsel for plaintiffs took exception to "pain and suffering" in corrected Findings. [31]

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came regularly on for trial before the undersigned judge of the above entitled court sitting without a jury at Couer d'Alene, Idaho, on the 10th day of June, 1948. The plaitniffs appeared in person and were represented by their counsel, W. J. Nixon and Geo. W. Young. The defendant was represented by John A. Carver, United States Attorney for the District of Idaho and E. H. Casterlin, Assistant United States Attorney for the District of Idaho. Findings of Fact and Conclusions of Law and Judgment were entered herein on the 22nd day of June, 1948, and thereafter the defendant made its Motion for Order Amending and Correcting Findings of Fact, Conclusions of Law and Judgment, and plaintiffs made their motion to strike or in the alternative to amend Findings of Fact. That the Motion to Strike or in the alternative to Amend Findings of Fact of the plaintiff was denied as appears from the minutes of this Court of October 18, 1948, and the Motion for Order Amending and Correcting Findings of Fact, conclusions of law and Judgment of the defendant was granted as appears from the minutes of this Court of October 18, 1948, and the Court does make the following [32]

AMENDED FINDINGS OF FACT

1. That the plaintiffs at the times mentioned were husband and wife, constituting a community under the laws of the State of Idaho.

2. That they are citizens of the State of Idaho, residing at Bonners Ferry, Boundary County, Idaho.

3. That this action is brought and properly maintained under and by virtue of 28 U. S. C. A. (Supp.) Sec. 931.

4. That on or about the 14th day of May, 1947, plaintiff, Raymond Downum, was driving a Model A. Ford truck owned by the plaintiffs over and along a county road, two and one-half miles west of the town of Bonners Ferry, Idaho, between the hours of 1:00 and 2:00 o'clock in the afternoon, driving in an easterly direction. That at said time and place one Corporal Clyde W. Smith, for the use and benefit and under the direction of the defendant, was driving a one and one-half ton dump truck owned by the defendant in a westerly direction over and along said road approaching the vehicle then and there being driven by the plaintiff. That said Corporal Smith did then and there drive said dump truck in a careless and negligent manner and as a direct and proximate result of such carelessness and negligence, it collided with the truck of plaintiffs with great force and violence causing physical injury to plaintiff, Raymond Downum, and the destruction of plaintiff's truck, as hereinafter more particularly found.

5. That the negligence of said Corporal Smith, driver of said truck, consisted of his driving the same on the wrong side of the roadway directly in the path of the plaintiff's truck, without excuse or cause therefor proximately occasioning the col-

lision between said vehicles and as a proximate result therefrom the plaintiffs sustained damage. [33]

6. That immediately prior to the collision of said vehicles plaintiff Raymond Downum was a strong, healthy, able bodied man, aged thirty-five years. That immediately after said collision and as a result therefrom, said plaintiff became lame, sick, sore and disordered, and shall remain so for the remainder of his natural life, which, according to the American Mortality Table, is thirty-one years.

That said plaintiff sustained a terrific shock to his entire nervous system; the nerves, muscles, tendons, and soft tissue generally was bruised and damaged.

That he sustained numerous comminuted fractures to the bones of his face, a fracture of his nose, a cranial nerve injury essential to sight, occasioning him to suffer permanently from diplopia, disfiguration and permanent scars on his face in the region of his left eye and nose, impairment of the tear duct of his left eye, damaged nerves in his right shoulder occasioning a marked weakness and atrophy in his right hand, diminishing normal functional use thereof, comminuted fractures of the shafts of the right and left femurs, a fracture of the right patella.

That said plaintiff's injuries were such as to cause him to suffer excruciating pain; that he is presently suffering from pain and will in all reasonable certainty continue to suffer from pain and discomfort for the rest of his natural life, and that his injuries are such that in reasonable probability

several additional operations will have to be performed upon his person.

That for a period of five years prior to his injury, the plaintiff, Raymond Downum, earned an income averaging in excess of \$4,000.00 per annum. That at the time of his [34] injury and for some months prior thereto the said plaintiff was gainfully employed and was earning \$10.00 per day. That it would appear from all of the evidence that said plaintiff was capable of earning at least \$3,000.00 per annum.

That the plaintiffs were damaged by reason of the loss of their truck, hospital, medical care, ambulance services and special nursing in the sum of \$3,473.88.

That said plaintiff was totally incapacitated for all purposes for a period of one year following his injuries. That at the time of trial he was incapacitated for all purposes to an extent of from seventy-five to eighty per cent of total disability. That in all reasonable certainty he will be totally incapacitated for all purposes for the remainder of his natural life in a degree of at least sixty per cent.

That plaintiffs have sustained a damage for pain, suffering, personal injuries and permanent physical disability including the special damage hereinabove found, in the sum of \$64,973.88.

7. That the plaintiffs required the services of attorneys and counselors at law for the preparation and maintenance of this action, and the Court finds \$12,000.00 is a reasonable amount to allow said attorneys for their services, which sum shall be paid

out of, but not in addition to the total amount herein found to be due the plaintiffs.

Done in open court this 1st day of November, 1948.

CHASE A. CLARK,
Judge.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. That the plaintiffs should have and recover judgment of and from the defendant in the total sum of \$64,973.88. [35]

2. That the sum of \$12,000.00 should be allowed W. J. Nixon and Geo. W. Young as and for attorneys fees, said sum to be paid out of but not in addition to the total amount hereinabove found to be due the plaintiffs.

3. That the plaintiffs should have and recover costs against the defendant.

Done in open Court this 1st day of November, 1948.

CHASE A. CLARK,
Judge.

[Endorsed]: Filed Nov. 1, 1948. [36]

(Item 12 in Praecepte.)

No Amended Judgment was filed. [37]

[Title of District Court and Cause.]

TRANSCRIPT

This matter was tried before the Honorable Chase A. Clark, sitting without a jury, at Couer d'Alene Idaho, on June 10, 1948.

Appearances: W. J. Nixon, Esq., Bonners Ferry, Idaho; George W. Young, Esq., Spokane, Washington, Attorneys for the Plaintiff. John A. Carver, United States District Attorney; E. H. Casterlin, Assistant United States District Attorney; Paul S. Boyd, Assistant United States District Attorney, all of Boise, Idaho, Attorneys for the Defendant.

G. C. Vaughan, Reporter. [38]

June 10, 1948, 10:00 o'clock a. m.

The Court: Are you Gentlemen ready in the case called:

Mr. Young: Plaintiff is ready.

Mr. Casterlin: We are ready.

Mr. Young: The Plaintiffs in this case are husband and wife, Raymond and Edna Downum; citizens of the State of Idaho, residing at Bonners Ferry. The action is brought and maintained by virtue of Title 28 U. S. C. A. Supplement 931.

It is alleged that on the 14th of May, 1947 the Plaintiff Raymond Downum was driving a Model A. Ford Truck owned by the plaintiffs over a county road two and a half miles west of the town of Bonners Ferry, Idaho, between the hours of 1 and 2 o'clock in the afternoon, in an easterly direction and that at the said time and place one Cor-

poral Clyde W. Smith, for the use and benefit of the defendant was driving a one and a half ton dump truck owned by the defendant in a westerly direction over the road approaching the vehicle then and there being driven by the plaintiff. This truck came to a collision with the plaintiff's truck,—a head-on collision; that the plaintiff was driving in a careful and prudent manner on the right side of the road, having in mind the condition of the road and so on; that there was a head-on crash between the two cars. [42] It is our purpose to establish the ownership of the truck in the United States Army who was in charge, and to establish that the driver was acting within the scope of his employment as a member of the armed forces; that as a result of the collision Mr. Downum was grievously injured; that he was hospitalized for approximately eight months; that there were expenses incurred as set forth and there is a general prayer for damages of \$100,000.00 and other or special damages of \$4,473.88, a total of \$104,473.88. Essentially that will be our case.

Mr. Casterlin: To simplify the issues I will call attention to the fact that the answer admits that plaintiffs now are and were husband and wife; that they are citizens of the State of Idaho, residing at Bouners Ferry; that this action is under the Federal Tort Claims Act. The United States further admits that on May 14, 1947 Clyde W. Smith whose present address is unknown, was a corporal in the United States Army stationed at Geiger field; that about the 9th of May 1947 a convoy of Army trucks

were on official business, of which the Chevrolet dump truck, one and a half ton, U S 359178 driven by Corporal Smith was a part, were assigned to Bonners Ferry, Idaho to assist in the control of flood waters of the Kootenai River; that the convoy arrived at Bonners Ferry on May 10, 1947 and were thereafter continuously engaged in hauling dirt as a part of the work of flood control, that on May 14, 1947, at 1 o'clock P. M. Corporal Smith of the United States Army whose present address is [43] unknown to the United States District Attorney, was directed to drive the Chevrolet dump truck to Flood Control District No. 7, and to ascertain there who was operating a particular two and a half ton army truck. The United States further admits that if members of the staff of the Sacred Heart Hospital, Spokane, Washington, competent to testify, were present in Court testifying under oath, that the person or persons called to the stand would testify that the charges in the instrument attached to the pleadings designated as statement of account folio 92-1220 Ray Downum are the regular fixed charges for such services and that the services were actually rendered.

The defendant will further admit if members of the staff of Bonners Ferry Hospital, competent to testify in this matter were present testifying that they would testify that the charges in the statement of account in the matter of Ray Downum are regular fixed charges and are reasonable and that the services were actually rendered. The defendant will further admit that if Frank Morse were present and

testifying he would testify that the charge of \$57.50 for ambulance service from the scene of the wreck to Bonners Ferry Hospital and from Bonners Ferry Hospital to Sacred Heart Hospital Spokane, Washington, was reasonable for such services and [44] that such service was rendered. The defendant will further admit that \$5.00 is a reasonable rental charge as shown on the statement presented, and the defendant will further admit that the charge of \$60.00 at the rate of \$1.00 per hour is a reasonable charge for special nurse in the vicinity of Spokane, Washington where the services were rendered and if the nurse was present testifying that she would so testify, and she would testify that she worked sixty hours on the matter of Ray Downum.

Mr. Young: For the purpose of clarity, you are admitting the amounts set forth in the complaint.

Mr. Casterlin: I am admitting that your witnesses would testify as I have stated.

Mr. Young: Shall I put in the accounts.

Mr. Casterlin: I am admitting that your witnesses would testify as I stated.

The Court: Is there any dispute on the question of negligence?

Mr. Casterlin: We are not admitting negligence.

The Court: Very well, you may call your first witness.

JOSEPH E. CAHILL

Called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

(Testimony of Joseph E. Cahill.)

Direct Examination

By Mr. Young:

Q. Where do you reside?

A. 1927 West Riverside.

Q. Are you a member of the armed forces?

A. Yes, sir.

Q. Of the United States?

A. Yes, sir.

Q. Do you have a commission?

A. First lieutenant, air force.

Q. Were you such on the 14th of May, 1947?

A. I was.

Q. What was your particular capacity in 1947, on May 14?

A. May 14, I was claims officer, at Geiger Field, Washington.

Q. Did you have in your district, Bonners Ferry, Idaho, for the purpose of adjusting claims?

A. I did.

Q. Did you investigate, on behalf of the United States a claim arising out of a collision between an Army truck referred to here by statement of counsel and a truck driven by Mr. Ray Downum?

A. I did.

Q. Did you go out to the scene where the collision took place?

A. I did.

Q. I believe you stated that you are personally connected with the United States Armed forces?

A. That is correct. I am still a First Lieutenant assigned to the Spokane Air Force base. [46]

(Testimony of Joseph E. Cahill.)

Mr. Young? I am using the witness as an adverse witness?

Mr. Casterlin: That is not according to the rules of civil procedure and I shall object.

Mr. Young: May I ask leading questions?

The Court: You may.

Mr. Casterlin: I object to the general request to ask leading questions on the ground that it is taken care of under the rules of Civil Procedure.

The Court: It may be understood that he is calling him as an adverse witness under the rules of civil procedure and he may proceed.

Q. Now, when did you arrive at the scene of the accident?

A. When did I arrive there?

Q. Let me ask this, when you arrived at the scene you saw Mr. Downum's car, his truck?

A. The truck was removed but there was evidence of the collision point.

Q. Evidence of the collision point indicating that a collision took place on the down side of the road?

Mr. Casterlin: I object to this question, there is no adverse witness under the rules.

The Court: In the first instance Mr. Young, you may ask him the question, as to the condition he found there.

Q. What did you observe when you arrived at the scene of [47] the collision?

A. I arrived at the scene of the collision three and a half or four hours after the accident on the south or the right side of the road inbound toward Bonners Ferry. There were bits of charred

(Testimony of Joseph E. Cahill.)

wood and metal and also piles of dirt and bits of glass and rope and parts of automobile.

Q. With respect to the road did you make any observation as to the width of the road?

A. I did.

Q. How wide was the road at that point?

A. I cannot say exactly but it is wide enough for two conventional vehicles to pass.

Q. Does it extend east and west at that point?

A. It runs east and west at that point.

Q. Is it straight for some distance?

A. Yes, sir, it is.

Q. Was it built on top of the dike?

A. This point I understand was a dike roadway.

Mr. Casterlin: We object to the statement on the ground that it is hearsay, he was not present at the time and it is expressing an opinion from facts which he found there, which is a matter for the Court to determine.

The Court: He can testify as to what he found at this point, it may be connected up later, or it will be stricken. [48]

Q. The point that you are referring to, having in mind the village of Bonners Ferry, how far removed was it, this general point you are referring to?

A. The scene where I found this debris?

Q. Yes, how far is that?

A. It is not more than three miles west of Bonners Ferry?

Mr. Young: You may inquire.

Mr. Casterlin: No questions.

EARL WHITBECK

being called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. Where do you reside?

A. Bonners Ferry.

Q. Were you living there on May 14, 1947?

A. Yes, sir.

Q. Are you acquainted with Ray Downum?

A. Yes, sir.

Q. He is the gentleman sitting here (indicating)?

A. Yes, sir.

Q. Did you have your attention called to the fact that he had been in a collision with an army dump truck?

A. Yes, sir, I did.

Q. Did you learn that fact?

A. I definitely did. [49]

Q. How did you come to know that?

A. I came on the scene of the accident.

Q. What did you observe when you came upon the scene of the accident?

A. I was proceeding to Bonners Ferry from District number seven.

Q. Traveling in the same direction that Downum was traveling? A. Yes, sir.

Q. Go ahead?

A. I noticed while I was some distance away, I recognized Mr. Downum's truck and I saw he had been in collision with an army truck. I pulled up alongside of the truck,—Mr. Downum's

(Testimony of Earl Whitbeck.)

truck, and Mr. Downum was half sitting and half lying in the truck. He was alone and I tried to pull him from the truck but he was pinned fast. There was no one else at the scene of the accident. About then Mr. Carlson hollered to me and said——

Mr. Casterlin: I object to what someone else said as hearsay?

The Court: Yes, just what you observed, go ahead.

A. I found no one present and I was led to understand that the driver of the truck had borrowed a car and had gone for help.

Q. The driver of the army truck?

A. Yes, sir.

Q. Mr. Downum's truck was situated on the right side, that [50] is, the right hand side of the road in the direction he was going?

A. Where he should be, on the side he should be, at the extreme edge he couldn't have gone closer without going off the edge. The Army truck had apparently hit him——

Mr. Casterlin: We object to what the army truck had apparently done.

Mr. Young: Just what you saw, Mr. Whitbeck.

A. The army truck had hit Mr. Downum's truck almost head on. It was on the extreme right, that is, the left hand side as he was traveling from Bonners Ferry, on the right hand side going toward Bonners Ferry.

Q. The army truck was almost head on with the Downum truck? A. Yes.

(Testimony of Earl Whitbeck.)

Q. Now you suggest some angle there, what was the angle?

A. Very slight, it looked as if he was almost directly on the wrong side, he veered over a very little.

Q. Mr. Downum was as far on his side of the road as he could get without dropping off the side of the road? A. Yes, sir.

Q. Describe that road with respect to how it is constructed along there, where it is, and what kind of a road was it?

A. It was a dirt road.

Q. A dirt road, go ahead.

A. Yes, sir, and it is a dike road there. The road itself had some gravel; at the time of the accident the gravel was all ground in. It was a gravel road but it was not [51] too well maintained.

Q. Do you know the width of the travelled surface?

A. I never measured it but I could make an estimate.

Q. Give your opinion as to the width of it?

A. I should judge approximately 20 feet wide at that point.

Q. Twenty feet, did you say?

A. Yes, about.

Q. On the right hand side of the road,—having in mind the direction in which Mr. Downum was traveling, what if anything was on the right hand side beyond the traveling surface of the road?

A. In the form of a shoulder, you mean?

(Testimony of Earl Whitbeck.)

Q. Yes.

A. A very slight shoulder, it dropped off into the ditch. The road took in all of the dike.

Q. If he had gone farther to the right he would have gone off in the ditch? A. Yes, sir.

Q. What was the depth of that ditch?

A. I would say between ten and fifteen feet.

Q. Then is there a borrow pit along the side or the bottom of the dike?

A. Yes, sir, there is.

Q. Calling your attention to plaintiff's exhibit 1, I will ask you if that exhibit fairly depicts the Downum car after the army truck had been removed? [52] A. Yes, sir.

Q. Do you know whose car that is to the rear?

A. My car.

Q. Does that picture fairly depict the position that the Downum car occupied in reference to the road way? A. Yes, sir.

Q. What kind of truck was Mr. Downum driving?

A. A Model A one-ton truck, or a three-quarter-ton truck, I am not sure, and I am not sure that is my car, but I was parked about in that position.

Q. You may look at it again.

A. That is not my car.

Mr. Young: I offer exhibit 1, in evidence at this time.

The Court: Any objection?

Mr. Casterlin: May I ask a question or two?

The Court: Yes, you may.

(Testimony of Earl Whitbeck.)

By Mr. Casterlin.

Q. Were you present when this picture was taken? A. No, sir.

Q. Then you don't know whether this Downum truck was removed before this picture was taken?

A. This is the Downum truck?

Q. Yes, but I meant, you don't know whether it have been moved after the accident and before the picture was taken? [53]

A. No, I cannot say.

Q. You have been handed exhibit 1 again, now tell us if the Downum truck was in that same position when you first saw it?

A. That is a good picture of the truck as it was when I arrived.

Mr. Casterlin: No objection.

The Court: It may be admitted.

By Mr. Young.

Q. Calling your attention to exhibit marked Plaintiff's exhibit 2, I will ask you if that fairly depicts the Downum truck?

A. Yes, sir.

Q. At the time you first saw it?

A. Yes, of course, the other truck was fastened to it when I saw it first.

Q. You pulled them apart.

A. Yes, sir.

By Mr. Casterlin:

Q. The only difference in the trucks between the time you first saw it and the time the picture was taken was that the Government truck was moved?

A. Yes, sir.

Q. It was moved after you got there before the picture was taken? [54]

(Testimony of Earl Whitbeck.)

A. When we pulled this Government truck it is possible that we pulled the Downum truck from the edge of the grade?

By Mr. Young:

Q. Pulling the army truck from the Downum truck would have a tendency to move the Downum truck toward the center of the road if anything?

A. Yes, sir.

Q. As you pulled the Army truck from the Downum truck, how did you accomplish that?

A. There was a convoy of army trucks, possibly ten of them coming and I flagged them down and used the first one to hook on the army truck and pulled it out.

Q. What happened to the Downum truck when you pulled the army truck off?

A. The Downum truck caught fire.

Q. What did you do to extricate Mr. Downum from the wreckage?

A. I pulled him out.

Q. You pulled him out?

A. Yes.

Q. And what was his condition?

A. I pulled him out; he was helpless; he was pinned fast and that is why I hooked the army truck on the other army truck and that the Downum truck caught fire and I jerked him out. I don't know what gave before I got him out of there.

Q. Mr. Whitbeck, do pictures marked three and four fairly [55] depict the conditions as they were on the highway there?

A. Yes, sir.

Q. (By Mr. Young): I offer these for illustrative purposes as to the extent of the damage.

Mr. Casterlin: Damage to the truck.

(Testimony of Earl Whitbeck.)

Mr. Young: Yes, and the force of the impact.

Mr. Casterlin: May I ask a question.

The Court: Yes.

By Mr. Casterlin:

Q. Do you know where the truck was located when pictures marked exhibits 3 and 4 were taken?

A. I left the scene of the accident as soon as possible. I imagine it was still in the original spot.

Mr. Young: I offer these as illustrative of the damage to the truck and surrounding conditions.

Mr. Casterlin: As so limited I have no objection.

The Court: They may be admitted.

By Mr. Young:

Q. In what condition was Mr. Downum insofar as you were able to observe. What did you observe about his face and head?

A. He was in a terrible condition. If I had not known him well I would not have recognized him. The left hand said of his face was battered out of shape and was a bloody pulp.

Q. What else did you observe? [56]

A. I could observe instantly that both legs were broken. It was obvious.

Q. Did you observe anything else in regard to the injuries?

A. Well, it seemed, perhaps I was afraid of it, but I thought one shoulder was broken; he had difficulty in moving his head, but I don't know as to that.

Q. Did you go to the hospital with him?

A. No, sir, I went to find his wife.

(Testimony of Earl Whitbeck.)

Q. At the scene of the accident was he suffering any pain?

Mr. Casterlin: We object to the question. The witness is not qualified to answer.

Mr. Young: Withdraw that.

Q. When the truck caught fire what happened to Mr. Downum?

A. He caught fire too.

Q. Were you able to extinguish that?

A. Yes, of course. We dragged him from the truck immediately and laid him on the road beside his truck. Mr. Davidson and Mr. Walters appeared on the scene and we extinguished the fire.

Q. Did Mr. Downum complain of pain in your presence?

A. Yes, he was suffering terrible.

Mr. Casterlin: I object to that and move to strike it.

The Court: The first part may stand, the answer yes sir.

Q. What did he say about one of his eyes? [57]

A. He feared that one of his eyes were out. He wouldn't believe me when I told him it was still in his head.

Q. Did you see him at the hospital later?

A. Yes.

Q. When did you see him at the hospital the first time?

A. At the Bonners Ferry hospital, I cannot say now how many days it was after the accident.

Q. What condition was he in with respect to whether he appeared to be suffering from pain?

(Testimony of Earl Whitbeck.)

Mr. Casterlin: Objected to as calling for a conclusion on the part of this witness, and he is not qualified.

The Court: It is easy to know when a person is suffering but I will not permit him to express an opinion on it.

Q. What condition was he in when you saw him in the hospital. What did you observe about him?

A. They had both legs suspended. He was bandaged about the head. I could only see part of his face.

Q. Did you converse with him?

A. Yes, I did, he was able to talk.

Q. How frequently did you visit him at Bonners Ferry Hospital?

A. I had only the opportunity to see him once before he was taken to the Spokane Hospital. [58]

Mr. Young: You may cross examine.

Cross Examination

By Mr. Casterlin:

Q. As I understand it, the place where you found these two cars was on a country highway between,—I will restate that,—the place you found these two cars was on a country highway west of Bonners Ferry?

A. That is correct.

Q. The road runs in an easterly and westerly direction?

A. That is correct?

Q. The road was about twenty feet wide at that point?

A. Yes, sir.

Q. The road followed the top of the dike?

A. Yes, sir.

Q. As Mr. Downum travelled in an easterly di-

(Testimony of Earl Whitbeck.)

rection his portion of the road would be on the south side? A. Yes, sir.

Q. As Corporal Smith was going in a westerly direction his portion of the road would be on the northerly side? A. Yes, sir.

Q. Was that road paved or oiled?

A. No, sir.

Q. Just ordinary dirt surface?

A. It had been gravelled. [59]

Q. What was the condition of the surface of the road on May 14, 1947?

A. I don't understand.

Q. As to whether it was dry or wet?

A. It was dry.

Q. Whether the gravel was loose or well packed?

A. I would say well packed.

Q. How about the wind condition that day?

A. I don't remember.

Q. How about the dust condition?

A. It was rather dusty.

Q. You were not there at the time of the accident. A. No, sir.

Q. Do you know how long after the accident you arrived?

A. I cannot say, no, I cannot say exactly.

Q. On one occasion you used the words "we dragged him from the truck" what do you mean?

A. I dragged him myself, two others tried to move the cushions so I could move him easier.

Q. Who were they?

A. I don't remember except one was the Lutheran Minister at Bonners Ferry at that time, I don't remember his name now.

(Testimony of Earl Whitbeck.)

Q. How long was it after you arrived did this minister arrive? A. I couldn't tell. [60]

Q. He wasn't there when you arrived?

A. I was the first one.

Q. How long after the Lutheran Minister arrived was it before anyone else arrived?

A. I cannot say. This army convoy arrived next.

Q. From which direction did this convoy come?

A. From Bonner's Ferry.

Q. And before you arrived at the truck had you met any other trucks coming in a westerly direction?

A. I cannot remember.

Q. You can't remember that. A. No.

Q. When you first arrived was Mr. Downum,—strike that,—After you arrived what was the first thing said or done?

A. I called his name and he recognized me and immediately asked me to take him out of the truck.

Q. He asked you to take him out of the truck?

A. Yes, he was almost delirious, he kept repeating and begging me to take him out of the truck.

Q. Wasn't that a normal request?

A. Very normal.

Q. From the circumstances, you say the fact that he repeated it, would that indicate that he was delirious?

A. Perhaps delirious is too strong, he was frantic.

Q. He was frantic?

A. Yes, I think so. [61]

Q. He made an intelligent request?

(Testimony of Earl Whitbeck.)

A. That covers a lot of territory, intelligence,—he wouldn't think of anything else.

Q. After you removed him from the truck did you have a conversation?

A. He was not in any condition to have a conversation?

Mr. Casterlin: I move to strike the answer as it is not responsive.

The Court: It may be stricken.

Mr. Casterlin: Read the question.

(Question read by Reporter.)

A. There was a conversation.

Q. You remember that?

A. Yes, I can remember definitely on that.

Q. What was that conversation?

A. He kept calling my name and said "tell me the truth, is my eye out," I said "No." As far as I could say he perhaps would gain the vision of it.

Q. Was there any further conversation?

A. His truck was on fire and we dragged him out, the fire continued to burn and I dragged him behind the truck, back some distance to where my car was situated. He kept making exclamations of pain, he said several things. He repeated things and that's why I made the remark that he was almost delirious, he reiterated about his eye. He also asked that his face be bathed that he couldn't [62] breathe, I held his head in my lap and an army officer brought a canteen of water and we bathed his face. He said "Earl was I on the right side of the road, on my side

(Testimony of Earl Whitbeck.)

of the road” and I said “you were as far as I know” and he repeated that several times.

Q. Were you there when the ambulance came?

A. Yes, sir.

Q. Did you go with the ambulance?

A. I helped put him in the ambulance and followed it into town.

Q. How long after that was it you went to the hospital to see Mr. Downum?

A. Several days, I went for his wife instead of going to the hospital right then.

Mr. Casterlin: I think that’s all.

Mr. Young: That’s all.

ROY BEAM

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Young:

Q. You are a resident of Bonners Ferry?

A. Yes, sir.

Q. You are the sheriff of Boundary County, I think?

A. Yes, sir.

Q. Did you ever have called to your attention this collision [63] that we are having this litigation about?

A. Yes, sir.

Q. When was that?

A. At the time.

Q. What were the circumstances of having this called to your attention?

A. It was during the flood, I had been out at the time and I had an extra man in my office, when I came in he said there was a wreck on number one dike.

(Testimony of Roy Beam.)

Q. Did you go out to the wreck?

A. Yes, sir.

Q. What did you observe?

A. Mr. Downum on the ground with his head in Mr. Whitbeck's lap.

Q. That was when you arrived at the scene?

A. Yes, sir.

Q. And what was Mr. Downum's condition?

A. You could hardly recognize him, someone told me who it was at the time.

Q. Had you known the man before?

A. Yes, sir, for a long time.

Q. Had you not been informed who he was you would not have known him?

A. I would not have known him.

Q. What did you do at the scene of the wreck?

A. The ambulance came and we loaded him in the ambulance and I went ahead with red lights to clear the traffic to get him to the hospital.

Q. Did you observe the position of Mr. Downum's car with respect to the right hand side of the road, having in mind the way he was travelling?

A. Yes, sir.

Q. What was the position of his car?

A. He was on the extreme right hand side of the road.

Q. He was on the extreme right side of the road?

A. He couldn't get any farther.

Q. Did you observe the army truck?

A. They had moved it.

Q. Did you make observation of the point of impact?

(Testimony of Roy Beam.)

A. Yes, I made observation but I was more interested in getting Mr. Downum to the hospital.

Q. Did you see Mr. Downum at the hospital?

A. We put him in the hospital.

Q. You helped put him in there?

A. Yes, sir.

Q. During the time you observed him did he make any complaint as to suffering from pain?

A. Yes, he did, he was groaning but the Doctor had given him a hypo to quiet him some by the time we got him to the hospital.

Q. Did the doctor come with the ambulance?

A. Yes, sir. [65]

Q. What doctor was that?

A. Doctor Durose.

Q. (By Mr. Young): You may inquire.

Cross Examination

By Mr. Casterlin:

Q. What was the road condition that day?

A. It was a gravelled road and it was dusty?

Q. Was there any wind, if you recall?

A. I don't recall that.

Q. You don't recall. A. No.

Q. Were there any other cars on the road when you drove out to the vicinity of this accident?

A. No, I was driving quite fast, I didn't meet any and no one passed me.

Q. When you arrived at the vicinity of the accident what about the dust cloud arising from the back of your car, did you notice that?

A. I couldn't say about that.

(Testimony of Roy Beam.)

Q. Did you drive back of any car?

A. No, I drove ahead of the ambulance to clear the traffic.

Q. Did you notice the tracks that the truck driven by Mr. Downum or Corporal Smith had created?

A. No, sir, by the time I got to the hospital and back the traffic had made it impossible to see much, I noticed some skid marks back of the truck when I rushed up to Mr. Downum. [66]

Q. Back of which truck?

A. The army truck.

Q. Where were those with respect to the center of the road?

A. They were on the wrong side.

Q. On the south side that would be?

A. Yes, sir.

Q. How long were those skid marks?

A. How long, you say?

Q. Yes, how long were the marks, the skid marks?

A. I wouldn't venture to say, but you could see under the truck. There was so much tramping there where they had pulled the truck back, and when they pulled it back it wasn't in the same tracks that it went in.

Mr. Casterlin: That is all.

Mr. Young: Yes, that is all, thank you.

WALLACE DAVIDSON

called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

(Testimony of Wallace Davidson.)

Direct Examination

By Mr. Young:

Q. You live at Bonners Ferry?

A. Yes, sir.

Q. Are you acquainted with Mr. Downum?

A. Yes, sir.

Q. Did you have your attention called to the fact that he [67] was in a collision with an army truck on dike number seven road?

A. Yes, sir.

Q. Without repeating any hearsay, how did you get that information, Mr. Davidson?

A. Well at the time, I was at my parent's house for dinner. I was eating dinner when this army man came, and wanted to use the phone stating that there had been an accident down the road?

Q. When you got this information you went down, did you? A. Yes, sir.

Q. And you found Mr. Downum?

A. Yes, sir.

Q. Describe briefly the condition you saw there?

A. Well, I parked my car back from the accident and ran down the road, as I was going up to the scene they were pulling the army truck loose from the Downum truck. They had broken them apart and I walked in between them; just about that time someone said the Downum truck had caught fire, they had him loose and then we put dry dirt on to extinguish the fire and they pulled

(Testimony of Wallace Davidson.)

him back, he had caught fire and they extinguished that again, and the truck started to burn fiercely and at that time we pulled him back farther from the truck.

Q. What was the condition of Mr. Downum?

A. His face was not recognizable, his clothes were dirty [68] and torn; his legs were dangling loose.

Q. Did he give any manifestation of suffering from pain?

A. He was repeating different phrases, his concern was to get him away from the fire, he wanted to get away from there.

Q. With respect to his truck where was it with relation to the road, having in mind the direction he was travelling, with relation to the center of the road?

A. Where was his truck in relation to the center of the road?

Q. Yes?

A. On the extreme right hand side of the road in the way he was traveling.

Q. What side of the road was the army truck at the instant of the impact?

A. As I got there they were pulling him loose, he was on the wrong side of the road.

Q. State whether or not he was,—the driver of the army truck, was he in the pathway of the Downum truck?

Mr. Casterlin: Objected to as he was not pres-

(Testimony of Wallace Davidson.)

ent at the time and there is no foundation laid for this evidence.

The Court: Sustained.

Q. What did you observe with respect to the position of the army truck there at the scene?

A. He seemed to be at a slight angle to the other truck on the road, he was angled toward Mr. Downum's truck. [69]

Q. What part of the Downum truck was damaged?

A. The front end of the cab was sort of buckled down on his lap?

Q. What part of the army truck was damaged?

A. I didn't observe that too closely but the front wheel was damaged I know that.

Q. What wheel?

A. The left front wheel of the army truck.

Mr. Young: You may inquire.

Cross Examination

By Mr. Casterlin:

Q. Who was the man that came to the place you were eating?

A. It was an army man, I don't know his name.

Q. He wanted to use the phone?

A. Yes, sir.

Q. You cannot describe him can you?

A. No, but he seemed to be a tall man that is all I could say about him.

Q. Was it Corporal Smith?

A. I don't know.

(Testimony of Wallace Davidson.)

Q. Who was at the scene when you got there?

A. Mr. Whitbeck and this minister, Reverend Hemeck.

Q. Was there any army men there?

A. There were other army trucks and men but I don't know who they were. [70]

Q. How far did you have to go from where you heard this telephone conversation to the scene of the accident?

A. Half a mile.

Q. You saw them jerk him loose?

A. This army personnel they jerked the army truck loose.

Q. Did you see Mr. Downum taken out of the truck?

A. I did.

Q. Was anybody else there at that time except Mr. Whitbeck and this minister?

A. The army personnel was there.

Q. Did you see who took Mr. Downum out of the truck?

A. Mr. Whitbeck had hold of him when he was pulled loose.

Q. Did you observe the tracks of either of the trucks?

A. I did not.

Q. You don't know the course which either truck had followed previous to the collision?

A. No sir, I wasn't observing the trucks, we were interested in getting Mr. Downum free from the truck.

Q. All you know is where the trucks were when you got there, you don't know how they got in that position?

(Testimony of Wallace Davidson.)

A. No, I didn't see them get in that position.

Q. Did you see any other damage to the Government truck except the left front wheel?

A. I couldn't say the extent of the damage, I didn't pay much attention to that, I know they had to pull it loose [71] and that front wheel was damaged, what else I don't know.

Q. Did you notice any skid marks in the road?

A. I don't know.

Mr. Casterlin: I believe that is all.

Mr. Young: That's all Mr. Davidson.

IRBY WALTERS

called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. You live at Bonners Ferry Mr. Walters?

A. Yes, sir.

Q. Were you living there on the 14th of May 1947?

A. Yes, sir.

Q. Did you have called to your attention a collision participated in by Mr. Downum and a United States Army truck involved here in this case?

A. Yes, sir.

Q. On that date was it?

A. Yes, sir.

Q. You are acquainted with Mr. Downum?

A. Yes, sir.

Q. How did you learn of the collision?

A. I was at the ranch house eating dinner, I completed the meal and this driver of the truck or

(Testimony of Irby Walters.)

a soldier came to the door and wanted to use the telephone. [72]

Q. Then as a result of that you learned there was a collision up the road about half a mile?

A. Yes, sir.

Q. How did you get to the scene of the collision?

A. I rode with Mr. Davidson.

Q. With Mr. Davidson?

A. Yes, sir.

Q. Oh, he is the gentleman who just preceded you on the stand? A. Yes, sir.

Q. What did you observe when you arrived at the scene?

A. They were just pulling the two vehicles apart, Mr. Davidson and I passed between the two vehicles just as they were pulled apart. About that time Mr. Downum's vehicle burst into flames; Mr. Whitbeck was on the driver's side of Mr. Downum's vehicle trying to pull Mr. Downum out and Reverend Hemeck and another gentleman were pulling the cushions out from the Downum vehicle on the other side.

Q. As a result of those efforts he was extricated from the truck?

A. Yes; he was laid by the truck. We tried then to extinguish the flames on Mr. Downum.

Q. Did you notice the position of the Downum car on the road with respect to the way he was travelling? A. Yes, sir. [73]

Q. What position did it occupy, having in mind the way he was traveling?

(Testimony of Irby Walters.)

A. It was faced east on the extreme right-hand side of the road.

Q. What was the condition of the day with respect to the weather, was it clear?

A. The weather was clear.

Q. And was the road dry? A. Dry.

Q. Do you remember what time of the day it was that the collision occurred?

A. I would say it was somewhere near one o'clock or thereafter.

Q. Did you observe the position of the army truck with respect to the center of the road?

A. Yes, sir, I observed the army truck was on Mr. Downum's side of the road facing the Downum vehicle on a slight angle.

Q. Was the angle toward the Downum truck or away from it?

A. It would be toward the Downum truck.

Q. If this was the Downum truck and this was the Army truck (indicating) it would be this way, that is, angled toward the Downum truck?

A. Yes, sir.

Q. What was Mr. Downum's condition when you observed him? [74]

A. His face was badly bruised and bloody, his legs appeared to be broken, one foot was turned completely backward. As he was dragged away from the truck his legs were loose just as though they were badly broken. He was groaning considerable and complaining of the fire, asking to be taken away from the fire.

(Testimony of Irby Walters.)

Q. What was the width of the road at the place of this collision in your opinion?

A. I would estimate the width at the scene of the accident at about twenty-five feet.

Q. What was the surface of the road at that point?

A. It was a dirt road and it had been graveled.

Q. It had been graveled, was that recently?

A. No, it was graveled some years before, it was badly worn and the gravel was fairly dusty.

Q. Was it level?

A. Yes, sir, it was a level road.

Q. With respect to whether it was straight or any curve there at the point of the collision?

A. I would say it was straight.

Q. For some distance either way was it straight away or in a curve?

A. Yes, it was straight.

Q. For what distance? [75]

A. For perhaps a quarter of a mile each way.

Q. A straight piece of road? A. Yes, sir.

Mr. Young: You may inquire.

Cross-Examination

By Mr. Casterlin:

Q. You said that this road had been graveled some years before and was badly worn and dusty?

A. Yes, sir.

Q. Was that the condition on May 14, 1947, when you were there? A. Yes, sir.

Q. Did you observe any cars or trucks that day being driven over this section of road?

A. Yes, many of them.

(Testimony of Irby Walters.)

Q. Just explain the condition of the dust those trucks and cars raised.

A. I distinctly remember the discussion at the dinner table about the dust. There was a slight breeze, just enough to drift the dust slightly to the north.

Q. Could you tell us whether the dust was heavy and thick or light?

A. I would say it was heavy.

Q. Could you see to drive along it if you were following a truck say sixty to a hundred yards back of it? A. I believe so. [76]

Q. It wouldn't blind you and cause you to be unable to see the road?

A. I think a person could have driven in the dust at that distance.

Q. How about fifty yards?

A. I wouldn't say as to that.

Q. You wouldn't say as to that?

A. No, sir.

Q. Do you know who this soldier was that came to the house to telephone? A. No, sir.

Q. You were not there, at the scene, at the time of the collision so you couldn't tell us where the trucks were when they actually made contact?

A. No, sir.

Q. All you know is where you found them when you got down there? A. Yes, sir.

Q. You don't know how they got there?

A. No, sir.

Mr. Casterlin: I believe that's all.

Mr. Young: That is all.

DAYTON DOUGLAS

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows: [77]

Direct Examination

By Mr. Young:

Q. You are a resident of Bonners Ferry?

A. Yes, sir.

Q. Are you acquainted with Mr. Ray Downum?

A. Yes, sir.

Q. Did you become aware of a collision that he participated in with a United States Army dump truck?

A. Yes, sir.

Q. The collision that this litigation is over?

A. Yes, sir.

Q. The date is fixed as May 14, 1947, is that about the time as you remember it?

A. Yes, sir, that is right.

Q. Were you at the scene of the collision?

A. No, sir.

Q. You were the liaison officer working in conjunction with the army working up there?

A. Yes, sir.

Q. Your purpose in coming down was to bring down the written record of the operation of the truck that day?

A. Yes, sir.

Mr. Young: I think in view of the fact that it is admitted that the truck was operated in an official capacity by the Government, I don't think we need this [78] officer.

Mr. Casterlin: That's right. I told Mr. Young and Mr. Nixon what I would admit.

Mr. Young: That is true, but I wanted the

Court to know that we had these records available. That will be all for you, sir.

RAYMOND DOWNUM

Called as a witness for the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. You are Raymond Downum?

A. Yes, sir.

Q. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. How old were you when you got into this collision? A. I think I was thirty-five.

Q. You are a married man? A. Yes, sir.

Q. Of what does your family consist?

A. We have three children.

Q. Where were you raised?

A. Well, I was born in Arkansas and came to Idaho in 1918.

Q. You have made your home in Idaho since that time? A. Not all of that time. [79]

Q. How long have you been in Bonners Ferry?

A. Since 1940.

Q. What is your education?

A. Grade School education.

Q. What has been your business or vocation during your adult life?

A. Farming and manual labor.

Q. Have you any training for anything other than farming and manual labor? A. No, sir.

Q. Directing your attention to the 14th day of

(Testimony of Raymond Downum.)

May, 1947, immediately before this collision where were you and what were you doing?

A. I had been working on District seven dike and I was going home at the time of the accident.

Q. You were going home at that time?

A. Yes, sir.

Q. What did you observe immediately prior to the collision?

A. I had met three vehicles coming from Bonners Ferry; I think there was an army truck then a car then another truck following the car.

Q. Where were you traveling with respect to the right-hand side, having in mind the direction in which you were traveling?

A. I was at the extreme right.

Q. On your right side of the road? [80]

A. Yes, sir.

Q. At what speed were you traveling?

A. I wouldn't know but I would judge eleven, twelve or thirteen miles an hour, somewhere in there.

Q. What kind of equipment were you traveling in? What were you driving?

A. Model A. truck, either three-quarter ton or one ton, I am not sure of the size.

Q. You were driving between ten, eleven, twelve, thirteen or fourteen miles an hour?

A. Yes, sir.

Q. Upon what do you base your conclusion as to that?

A. I was driving as slow as I could in high gear, I know that.

(Testimony of Raymond Downum.)

Q. What was the condition under which you were operating the truck at that time?

A. It was dusty and there was a grey-like fog that you would be driving through.

Q. What was your vision ahead, that is, how far ahead could you see?

A. Well, I was driving along, I don't know how far ahead I could see there. I was driving by looking at the shoulder of the road and I would say I could see thirty or thirty-five feet ahead of the truck.

Q. When did you first observe the army truck?

A. I observed him directly ahead of me and then we crashed. [81]

Q. How far ahead did you observe the army truck?

A. I would judge the length of two automobiles, that would be my estimate.

Q. Assuming the average automobile is about fifteen and a half feet long, what would that estimate be, thirty-one or thirty-two feet?

A. About thirty-two or thirty-three feet I guess.

Q. Then there was that instant and crash?

A. Yes, sir.

Q. You were driving along looking out the side at the side of the road, did you have your eye on the side of the road or were you looking out front?

A. I was slowly driving along, and I was looking out to the front, driving along my side of the road.

Q. Was that road dusty for some distance?

A. Yes, it was dusty.

(Testimony of Raymond Downum.)

Q. There had been a number of vehicles traveling up and down the road hauling dirt and there was some dust in the air.

A. Yes, that's right.

Q. Could you have driven your car any further to the right of the road?

A. I didn't figure that I could. If I had I would have went into the ditch.

Q. Were you keeping a look-out for vehicles coming in the opposite direction? [82]

A. Yes, sir.

Q. After the crash, what happened?

A. Well, there was someone came to the door on the driver's side of the truck and asked if I was hurt. He tried to pull me out and he couldn't do it and then he said he was going for help, the next thing I knew Mr. Whitbeck was there at the door and he tried to get me out and he couldn't pull me out either until after they had pulled the army truck off my truck and then he pulled me out of the truck.

Q. Do you remember those things or are they what was told to you later, we want just what you remember yourself?

A. I remember those things.

Q. Do you remember those things yourself?

A. Yes, sir.

Q. What condition were you in a short time following the impact with respect to suffering from pain?

A. Just following the impact, I thought I was in the river, I could hear water on the hot engine

(Testimony of Raymond Downum.)

and for an instant I thought I was in the river, I couldn't see at all until this man came to the door and talked to me.

Q. When they finally dragged you out of the truck what condition were you in?

A. What do you mean?

Q. With respect to feeling anything?

A. I was in pain, my head hurt me and my legs hurt me, in fact, I hurt all over. [83]

Q. Was this a dull pain or a sharp pain that you felt? A. Sharp pain.

Q. You were taken to the hospital?

A. Yes, sir.

Q. What was done for you in the hospital, do you know?

A. I cannot say what all was done. I know I woke up in bed.

Q. Did you pass out?

A. Yes, they gave me a hpyo and I don't remember anything after that, I don't remember anything after they put me in the ambulance.

Q. Nothing after you were put in the hospital?

A. Until I was in a room in the hospital when I woke up.

Q. After you were in the room of the hospital I don't imagine you know what interval of time that was? A. No, sir.

Q. How long were you in the hospital?

A. I think from the 14th to the 27th of May in Bonners Ferry.

Q. You were moved from the Bonners Ferry Hospital? A. Yes, sir.

(Testimony of Raymond Downum.)

Q. To where? A. Sacred Heart, Spokane.

Q. When did you leave there?

A. The 22nd of December.

Q. 1947 A. Yes, sir. [84]

Q. Do you know how long you were in the hospital in period of months and days?

A. No, sir, not exactly.

Q. During that time you occupied a ward bed?

A. Yes, sir.

Q. During that time what was done for you?

A. Well, I was in traction and they operated on my right leg and put in bolts and screws and they operated on the partition in my nose, they straightened my nose and chiseled a hole for the tears to go.

Q. You had some trouble with the tear ducts?

A. Yes, sir.

The Court: We will recess at this time until 1:30 this afternoon.

June 10, 1948, 1:30 p.m.

Mr. Young: I offer plaintiff's exhibit 5, being an itemized statement of Doctor Durose in the amount of \$135.00.

I am also offering plaintiff's exhibit 6, which is a statement for \$300.00, I understand there will be some evidence on that later—no, I will withdraw exhibit 6 at this time.

I do offer exhibit 8 a statement from the Sacred Heart hospital for \$1898.25.

Mr. Casterlin: No objection to number 8. [85]

Mr. Young: I withdraw number 5 at this time.

Now, I offer exhibit number 10, a check for \$4.38 to the Spokane Surgical Supply Company.

(Testimony of Raymond Downum.)

Mr. Casterlin: No objection.

The Court: Admitted.

Mr. Young: I offer exhibit number 11, a check to Clara Coleman for nursing in the amount of \$60.00.

Mr. Casterlin: No objection.

The Court: Admitted.

The Court: Is there anything further?

Mr. Young: If I may have just a moment.

Now, Your Honor, I offer exhibit 13, no, this is number 12, a check for \$57.50 to Frank Morse with receipt attached, this is in payment for the ambulance account.

Mr. Casterlin: No objection.

The Court: Admitted.

Mr. Young: I now offer exhibit 13, a statement from the Bonners Ferry Hospital for \$213.75.

Mr. Casterlin: No objection.

The Court: Admitted.

Mr. Young: I have one here marked plaintiff's exhibit 16, but I will have these remarked during the recess. I have some confusion here on the exhibits. [86]

Mr. Young: I will recall Mr. Downum now.

Q. When you were in the Bonners Ferry hospital you described what was done for you there?

A. No, I didn't.

Q. Describe what was done at the Bonners Ferry Hospital.

A. Well, I was in traction there and they gave me blood plasma, and then they put me in a cast and sent me to Spokane.

(Testimony of Raymond Downum.)

Q. To the Sacred Heart Hospital?

A. Yes, sir.

Q. And you were placed under the care of Doctor Grieve, an orthopedic surgeon?

A. Yes, sir.

Q. You were in the hospital at Spokane for how long? A. Until the 22nd of December.

Q. Of that same year, 1947? A. Yes, sir.

Q. You were continuously in the hospital between the 14th of May and the 22nd of December, 1947? A. That's right.

Q. Did you experience any discomfort in the hospital? A. Yes, sir.

Q. Starting with the top of your head, tell us what injuries you sustained, what injuries did you sustain to your head?

A. I cannot use the medical terms but I had fractures around the eye. [87]

Q. The right eye?

A. That's right. The cheek was busted open and my nose was busted and the tear drain was damaged, it was ruined.

Q. What about your nose?

A. It was laid over on the right cheek, it was busted.

Q. Now what about your vision?

A. I have double vision when I look down or around to the left or the right.

Q. You see two objects instead of one?

A. Yes, sir.

Q. And have you noticed that since the time of the injury? A. That's right.

(Testimony of Raymond Downum.)

Q. It is that way now? A. Yes, sir.

Q. With regard to your shoulder, what shoulder was injured?

A. My right shoulder, something hit it on the front.

Q. What have you noticed with respect to the right arm if anything?

A. It puts my hand to sleep.

Q. Have you any difficulty with your right hand?

A. Yes, sir.

Q. What does that consist of?

A. No strength in it, sidewise.

Q. Can you make a fist?

A. Yes, I can do that.

Q. But there is a weakness this way (indicating). [88] A. Yes, sir, that is right.

Q. Between your index finger and thumb there is a depression. Was that there before the injury?

A. No, sir, it wasn't.

Q. Does that hand bother you when you attempt to use it? A. Yes, sir.

Q. In what way?

A. Any pressure sidewise to it, like using a wrench or reaching anywhere with my fingers.

Q. You can carry a bucket, can you, and that sort of thing? A. Yes, that's right.

Q. But in using your index finger and thumb do you have any strength in that sort of action?

A. Very little, practically none at all.

Q. Has that condition improved or is it about the same?

(Testimony of Raymond Downum.)

A. Well, the last six months I cannot see any improvement at all in that.

Q. Now Mr. Downum, with respect to the middle of your body was it injured?

A. No, sir, it was not.

Q. What injury did you have to your legs?

A. Both shattered, both femurs.

Q. Both femurs were broken?

A. Yes, sir, they were shattered.

Q. And the knee-cap what about that? [89]

A. It was busted, too.

Q. You had a broken right knee cap?

A. Yes, sir.

Q. With respect to the legs are they the same length now?

A. No, the left leg is three-quarters of an inch longer than the right one.

Q. Is that a different situation than obtained before the accident or injury?

A. This came about from the accident.

Q. Before this injury what was your general health, what kind of shape were you in?

A. Perfect.

Q. In good condition? A. That's right.

Q. Working every day, were you?

A. Yes, sir.

Q. Since the injury have you been able to work?

A. No, sir.

Q. You haven't worked at all since the day of the injury? A. Not a day.

Q. Have you tried to work?

(Testimony of Raymond Downum.)

A. Well, yes, I try to do what I can around but I tried to dig worms to go fishing the other day and that is very difficult for me to do that.

Q. I think you told me about a tire—something about a tire, what was that?

A. We had a flat and I tried to remove the tire from the [90] rim and I have to have help from my son and he got it off for me.

Q. Is that on account of your physical condition or any physical disability on account of this injury?

A. Yes, my stiff knee.

Q. When you first got out of the hospital were you able to walk?

A. Yes, I was on crutches just barely could get around.

Q. How long were you on crutches?

A. I think I have been using a cane now about one month, I don't know the exact date I quit the crutches, but it is about a month.

Q. Up to that time you were using crutches.

A. That's right.

Q. When you walk over uneven ground what trouble do you experience, if any?

A. I have to be very careful or I will fall down.

Q. Stepping over logs or going in rough country what is the situation?

A. I have to raise my leg out sidewise to get over a log or anything like that.

Q. Can you follow any manual labor at the present time.

Mr. Casterlin: Objection, that calls for an opin-

(Testimony of Raymond Downum.)

ion on the part of the witness and it would be a self-serving declaration.

The Court: He might testify what he can do.

Q. Can you do work that you customarily have to do on the [91] farm? A. No, sir.

Q. What about walking up and down hill?

A. If it is a smooth surface I can, but any unevenness it is difficult, if there is any trash, rocks or sticks it is difficult for me to get around.

Q. Do you or rather did you walk back to the hotel today?

A. No, sir, I rode in a taxi cab up here.

Q. You walked down to the hotel?

A. Yes, sir, I walked down.

Q. What effect does it have on you?

A. The leaders back of my ankle hurt, in here, and my foot pains a very sharp pain.

Q. When you are on your feet for two or three hours what do you experience?

A. At the time I am on them it doesn't bother so much, when I sit down then they stiffen and then I cannot straighten them up.

Q. Did you notice the manner in which the femurs were set in the hospital—did you notice any wound in the side of the leg? A. Yes, sir.

Q. What leg was that?

A. The bone came out in the side of the left and also a cast scar on that, and on the right leg a cast scar on that, too. [92]

Q. Did you notice, or do you know the manner in which the bones were healed, or in which they were held together to heal?

(Testimony of Raymond Downum.)

A. The right leg has two bolts and ten screws.

Q. Are those bolts and screws still in the bones?

A. Yes, they are.

Q. Do you know whether they—strike that—do you get any discomfort from the bolts that are holding the femur together in the right leg?

A. Yes, sir, if I sit like this I can feel the screws digging in. Too much weight like this; they are sharp pains I get.

Q. Your nose is out of midline. Was it that way before this accident? A. No, sir.

Q. That comes from this accident also?

A. Yes, sir.

Q. What have been your earnings in the past years, I think you prepared some answers to interrogatories? A. That's right.

Q. Where did you get the information from which to answer those interrogatories?

A. Income tax reports.

Q. I have given you copies of the answers you made? A. Yes, sir.

Q. Now, can you state what your income was for 1942? [93] A. Yes, sir, \$3039.22.

Q. And what was your income for 1943?

A. \$3696.73.

Q. In 1944? A. \$4104.12.

Q. And in 1945, what was it? A. \$4469.51.

Q. In 1946? A. \$5007.50.

Q. Then in 1947 you had a ranch that you sold?

A. That's right.

Q. You realized capital gain on this ranch and livestock in 1947? A. That's right.

(Testimony of Raymond Downum.)

Q. The capital gain was what?

A. \$6382.19.

Q. You didn't make an income tax return for 1947 outside of the capital gain on the ranch?

A. That's right.

Q. In 1947 what were you doing?

A. Working for wages.

Q. What wages were you earning up to the time of this wreck?

A. I had been working for Boyd-Conley at Bonners Ferry and also on the dike.

Q. What was the daily wage then? [94]

A. \$1.25 an hour, the best I remember.

Q. In addition to those wages you report working on a farm. What would you make in addition to that, that would be from the sale of poultry and eggs?

A. From the use——

Q. I will withdraw that question. That was stuff you used.

A. Yes, sir, we used that.

Mr. Young: I wonder if I may excuse this witness in order to call Doctor Durose at this time.

Mr. Casterlin: I have no objection, that may be done as far as I am concerned.

The Court: Very well.

DR. FREDRICK W. DUROSE

Called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. State your name and residence?

A. I am Fredrick W. Durose, M.D. I live at Bonners Ferry, Idaho.

(Testimony of Dr. Fredrick W. Durose.)

Q. You are licensed under the laws of the State of Idaho as a physician and surgeon?

A. Yes, sir.

Mr. Casterlin: We will admit the qualifications of the Doctor.

Mr. Young: Thank you. [95]

Q. Doctor, directing your attention to the Plaintiff in this case Raymond Downum, when and where did you first see him following this collision?

A. May 14, 1947, between two and three p.m. at the site of the accident about two miles west of Bonners Ferry on the dike road.

Q. What condition was he in?

A. He was semi-conscious, laid on the road with his head supported by an individual who came to help and who had helped to, or had removed him from the burning truck.

Q. You did the immediate things that were indicated there.

A. Yes, sir, applied bandages to the bleeding parts of his hands, face and legs. He had minor burns on the chest; his legs were obviously fractured, being twisted into unnatural shapes.

Q. The ambulance was sent for and he was taken to the hospital? A. Yes, sir.

Q. You were with him at the time?

A. Yes, sir.

Q. And then I presume you made a more detailed examination at the hospital?

A. Yes, sir; the first thing was to treat him for shock; he was in a state of shock at that time.

Q. What ultimately was revealed?

(Testimony of Dr. Fredrick W. Durose.)

A. We found a comminuted, compound fracture of the femurs, [96] both of them; he had a fracture of the skull involving the nose and multiple abrasions, lacerations and contusions.

Q. What about his knee-cap?

A. Abrasion of the knee-cap.

Q. A fracture indicated there?

A. I didn't determine that.

Q. What about the wrist and shoulder?

A. It was bruised and abraded.

Q. Fractured? A. No evidence of fracture.

Q. You gave treatment for shock, tending to keep the patient alive? A. Yes, sir.

Q. You didn't reduce those fractures?

A. Not at that time.

Q. You didn't want to add to the shock?

A. That's right.

Q. What did you do by way of controlling the fractures?

A. We applied extension to the lower extremities, Buck's extension.

Q. Describe this Buck's extension.

A. We place strips of adhesive tape along the extremities from as high up as we could and applying the extension of weights and pulleys to draw the bones to their original position.

Q. How long was Mr. Downum in the hospital?

A. May 14, and was transferred to Sacred Heart at Spokane on May 26, 1947.

Q. You referred him to Doctor Greave?

A. That's right.

Q. Taking your knowledge of this patient, the

(Testimony of Dr. Fredrick W. Durose.)

injuries and the general type and extent of them into consideration, state whether or not in your opinion they are permanent in nature?

A. It is my opinion he will have some permanent effects of the injuries in the lower extremities and also in the nose and face.

Q. What, with reasonable certainty—in other words, with reasonable certainty he will continue to suffer from these injuries the rest of his life?

A. That is my opinion.

Q. At my request did you bring the hospital record from Bonners Ferry? A. Yes, sir.

Q. Calling your attention to exhibit 14 marked for identification, I will ask you if that is the original of the hospital record?

A. That is the original record.

Q. I now hand you a document in typewriting and ask you if that is an exact copy of the original hospital record? [98] A. That's right.

Mr. Young: I would like to substitute this copy for what was marked as plaintiff's exhibit number 14.

Mr. Casterlin: We have no objection to substituting the copy.

The Court: The copy may be used.

Mr. Young: I offer it in evidence.

Mr. Casterlin: May I ask a question?

The Court: You may.

By Mr. Casterlin:

Q. The hospital bill states he was discharged on the 27th and in your testimony you said the 26th, can you tell us what occasioned that discrepancy?

(Testimony of Dr. Fredrick W. Durose.)

A. Yes, I ordered his discharge on the 26th and he was actually discharged on the following day because of the transportation problem.

Q. I hand you exhibit 13 and proposed exhibit 14. Now, I notice on 13 there is an item of private room thirteen days at \$6.50 total \$84.50, is that amount included in the proposed exhibit 14.

A. It is my opinion there were fourteen days, no, thirteen days are correct, that is included.

Q. Now, calling your attention to exhibit 13, the second item of \$63.00, does that include the item in exhibit 14? A. That is right. [99]

Q. Calling your attention to the last item X-ray eight large 14 x 17 and three medium 10 x 12 \$54.25, is that on exhibit 14? A. That's right.

Mr. Casterlin: No objection to exhibit 13.

The Court: I thought 13 was admitted, if not it may be admitted at this time. Doctor, is there an additional amount of \$213.75 in that exhibit?

A. No, sir.

The Court: Are we talking about the exhibit just offered now, isn't that number 14?

Mr. Young: Perhaps we are confused again on the numbers, I think the Court is right.

The Court: At any rate it may be admitted.
By Mr. Young:

Q. This record, Doctor, is to show the history of the case in the hospital. It includes the treatment? A. That is the purpose of this.

Q. And you rendered a bill for services for \$135.00. A. Yes, sir, that's right.

(Testimony of Dr. Fredrick W. Durose.)

Q. Do you consider that reasonable, taking into consideration the nature of the service?

A. Yes, sir.

Mr. Young: I offer exhibit 5 in evidence.

Mr. Casterlin: No objection.

The Court: Admitted. [100]

Mr. Young: You may examine.

Cross-Examination

By Mr. Casterlin:

Q. The Court: Before you start Mr. Casterlin, Doctor, not being a Doctor, of course, I don't know, but I understand that Doctors in treating patients of this kind are able to give their opinion on the percentage of permanent disability a person suffers. I wonder if you can answer such a question.

A. I prefer the question to be asked and answered by the Doctor who took care of him after I did.

The Court: Go ahead, Mr. Casterlin.

By Mr. Casterlin:

Q. You were first called to attend Mr. Downum on May 14. A. That's right.

Q. He was in your hospital at Bonners Ferry until May 27, is that correct? A. Yes, sir.

Q. Subsequent to May 27 have you been called to examine Mr. Downum? A. No, I have not.

Q. So that your testimony here in reference to the permanence of any injury is based entirely upon your examination prior to May 27?

A. That's right.

Q. You have had no opportunity to notice

(Testimony of Dr. Fredrick W. Durose.)

whether he has made [101] any progress between May 27 and the present time?

A. Only by seeing him on the street, apparently he has made considerable progress. When he was taken from my care he was totally disabled.

Q. But you wouldn't say permanently?

A. I couldn't say that.

Q. Your observation is that he has improved?

A. My observation has been casual.

Q. Your conclusion is that he has materially improved? A. He has materially improved.

Q. Have you any opinion as to whether or not this improvement will continue?

A. It is my opinion that he has probably made almost as much improvement as he is going to.

Q. You cannot determine that without an examination?

A. Not without seeing x-ray taken after my treatment?

Q. Taking into consideration the condition in which you found Mr. Downum on May 14, what percentage of recovery would you say that he has made, based on casual observation?

A. Literally he has recovered 99 and a fraction per cent because when I saw him I would not have given much for his chance of survival.

Q. Now, the treatment that you extended to Mr. Downum on May 14, did you do that to keep the patient alive?

A. That was the first concern. [102]

Q. On first observation did you consider that there was a likelihood of death?

(Testimony of Dr. Fredrick W. Durose.)

A. It was evident that he was seriously injured, suffering from shock which would have been the cause of death if he had expired at that time.

Q. So there was, in your opinion, a probability of his expiring at that time?

A. He would have expired had he not been given blood plasma at that time, that is my opinion.

Q. Your examination ran over his entire body from head to foot? A. Yes, sir.

Q. You state that most severe condition was in connection with the fraction of the femur.

A. That's right.

Q. Did you find in examining the right shoulder whether there was a puncture of the skin?

A. Several abrasions of the skin.

Q. Were those deep or superficial?

A. I cannot remember exactly about that, but they were marked enough to require dressing so that must have been through the skin, hemostatics or stopping the flow of blood.

Q. Did you find any evidence of deep skin puncture in the region of the shoulder?

A. Several abrasions and lacerations, the depth of them I don't recall.

Q. There has been some testimony here that Mr. Downum's [103] right leg is three-quarters of an inch shorter than the left leg; in your opinion as a Doctor, what effect would that have?

A. That amount would be compensated by the tilting of the pelvis.

Q. Would the tilting of the pelvis cause any difficulty.

(Testimony of Dr. Fredrick W. Durose.)

A. Could cause difficulty in the spine.

Q. Is there a treatment by which that can be adjusted?

A. The possible affection of the spine, you mean?

Q. Yes.

A. To build up for the loss of length on that side?

Q. That is the recognized treatment?

A. Yes, sir.

Q. Isn't it a fact that we find many people suffering with a back condition because of unequal length of legs?

A. Doctor Greave can answer that much more authoritatively than I, but that is my opinion.

Q. This can be corrected?

A. Compensated for rather than corrected.

Mr. Casterlin: That is all.

Redirect Examination

By Mr. Young:

Q. You made a statement Doctor, that Mr. Downum had made a 99 and a fraction per cent amount of recovery or improvement over what he was when you first saw him after this collision? [104]

A. I was speaking in terms of life and death; I would retract that 99 per cent, I meant to infer that he was so nearly expired that it looked hopeless.

Q. The fact that he is now able to walk with a cane and is alive is a material gain so far as he is concerned?

A. That's right.

(Testimony of Dr. Fredrick W. Durose.)

Q. Taking the total disability and what he now has is very material? A. That's right.

Mr. Young: That is all Doctor.

Recross-Examination

By Mr. Casterlin:

Q. You testified that the most severe condition you found was the fracture of the femur, have you examined him since with respect to this injury?

A. Not since he left my care.

Q. From your observation would you say he is getting along all right? A. What was that?

Q. From your observation would you say he is getting along all right, so far as these fractures are concerned?

A. As well as we can expect but not all right.

Q. So far as that condition is concerned, has he improved as much as he ever will?

A. I will refer you to the orthopedic men who are better [105] qualified to answer that.

Q. You don't care to express an opinion on his bone condition and nerve condition and eye condition?

A. I could only express a guess or opinion, I would prefer that the specialists answer those questions.

Mr. Casterlin: That is all.

Mr. Young: That is all Doctor, I wonder if the Doctor may be excused.

Mr. Casterlin: I have no objection.

The Court: You may be excused, Doctor.

WILLIAM E. GREAVE

Called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. Your name is William E. Greave?

A. Yes, sir.

Q. You are a physician and surgeon?

A. Yes, sir.

Q. You live in Spokane? A. Yes, sir.

Q. You are licensed as such physician and surgeon in the state and under the laws of Washington? A. Yes, sir.

Q. And you practice in the State of Washington? A. Yes, sir. [106]

Q. You specialize in any branch?

A. I limit my work to fractures and orthopedic surgery.

Q. Was Raymond Downum a patient of yours?

A. Yes, sir.

Q. Was he referred to you by Doctor Durose?

A. He was.

Q. Give us the history that you took, then, next in order your diagnosis.

A. He was referred to me in the Sacred Heart Hospital on May 27, 1947, he came in a double head spika cast.

Q. Describe that, will you Doctor?

A. It extends from the toes to above the waist, including both legs. It made him more comfortable so he could be moved from Bonners Ferry to Spokane. I had an x-ray taken to determine the position of the fragments, in the cast. The x-ray re-

(Testimony of William E. Greave.)

vealed comminuted fractures of both femurs and the bones were not in very good position; there was a comminuted fracture of the right patella.

Q. You use the word "comminuted" Dictor, explain a comminuted fracture?

A. More than two pieces of the bone.

Q. Would it be fair to state that the bone was shattered? A. Yes, sir.

Q. Was there evidence that those fractures were compound? A. I knew one was compound.

Q. By that you mean the break was through the skin also? [107] A. Yes, sir.

Q. Was part of the bone sticking out through the skin?

A. This history on the chart was taken by an interne while he had the cast on, of course.

Mr. Casterlin: Doctor, this history you are about to give us, was it taken by you or an interne?

A. The history on the chart was taken by an interne.

Mr. Casterlin: You didn't do that, you didn't take it personally? A. No, sir.

By Mr. Young:

Q. What do you know personally, Doctor about the condition of this man?

A. When I first saw him he was quite anemic, looked as though he had been through quite a trying time. We had an x-ray of the femur and also of the neck and face. The red blood count was low, hemoglobin was low.

Q. What do you mean by hemoglobin?

A. That is the red color in the blood.

(Testimony of William E. Greave.)

Q. You didn't immediately start orthopedic work on him?

A. After I saw the x-ray I removed the cast; put wires through the femur and applied traction; the traction was varied from time to time, trying to get the bone in good position, in as good position as possible. We found or rather it was determined that the right femur was not going into good position and I thought that was because there [108] was muscle between the ends of the bone, therefore I did an open operation on the right thigh and put in bolts with screws to hold it together?

Q. What type of bolts?

A. Rustless steel bolts.

Q. How long are those bolts?

A. About five inches.

Q. One on each side?

A. One on the side and one on front.

Q. These screws put into the bone and form a part of the bone now, Doctor?

A. Yes.

Q. Through the marrow of the bone?

A. Through the marrow; both sides of the bone.

Q. And how long are those screws?

A. Long enough to reach through the bone.

Q. How many screws did you put in?

A. Eight I think altogether, they will show in the x-ray.

Q. Doctor, will you get the x-ray in order in which they were taken?

A. I didn't bring all the x-ray with me, there was too big a lot of them. Now, here is a left lateral view——

(Testimony of William E. Greave.)

Mr. Young: —Let's have that marked as plaintiff's exhibit 15.

Q. Now go ahead, Doctor?

A. Here is an anterior-posterior view of the left femur. [109]

Mr. Young: We will mark that 16.

A. This is a lateral view of the right femur.

Mr. Young: We will have that marked 17.

A. Here is an anterior-posterior of the right femur, this is taken on May 27.

Mr. Young: And that will be marked 18.

A. This is on June 23, the right femur.

Mr. Young: That will be marked as 19.

A. June 23, another of the right femur.

Mr. Young: That will be marked 20.

A. Here is the right femur, lateral, this was in December.

Mr. Young: That will be exhibit 21.

A. This is an anterior-posterior in December of the right femur.

Mr. Young: That will be marked 22.

A. Here is the left femur in December, although you cannot read the dates on these so very well.

Mr. Young: That will be marked 23.

A. Here is a lateral view of the face.

Mr. Young: That will be marked 24.

Q. That all of them Doctor?

A. Yes, that is all the x-ray.

Q. Now then, Doctor, I am handing you exhibit 15 marked for identification, state whether or not that is an x-ray film?

(Testimony of William E. Greave.)

A. This is a lateral view of the left femur showing a fracture [110] here (indicating) with loose fragments, this (indicating) held the wire——

Q. ——Now, Doctor describe that more fully please, where is the wire?

A. There is a wire to hang the weight on, this is a splint his leg is resting on (indicating).

Mr. Young: I offer exhibit 15 in evidence.

Mr. Casterlin: May I inquire of the Doctor?

The Court: Yes, you may.

By Mr. Casterlin

Q. Doctor, calling your attention to exhibit 15, I notice over toward the left side there is a break in the femur, is that the only break in that femur?

A. This is loose bone here (indicating) and there are some other loose pieces of bone in here (indicating).

Q. But at that point is the only place the left femur is broken? A. Yes, sir.

Q. This heavy line is no part of the work left in his body at the present time (indicating).

A. No, sir.

Q. When was that picture taken?

A. May 27.

Mr. Casterlin: No objection.

The Court: It may be admitted. [111]

By Mr. Young:

Q. The femur is the main bone of the leg comprising the thigh? A. Yes.

Q. Calling your attention to exhibit 16, tell us what that shows, Doctor?

(Testimony of William E. Greave.)

A. An anterior-posterior view, front to back of the same bones. Here is the hip joint (indicating) and here is where this piece came out, there are small pieces of bone scattered all through the muscle in that neighborhood.

Q. When was that taken?

A. May 27, 1947.

Mr. Casterlin: Did you take that Doctor.

A. The x-ray technician under my order.

Mr. Casterlin: Under your supervision.

A. Yes, sir.

Mr. Casterlin: You know definitely they are pictures of Mr. Downum? A. Yes, sir.

Mr. Casterlin: No objection to its admission.

The Court: It may be admitted, if it was offered.

Mr. Young: Yes, I make the offer now.

The Court: It is admitted.

Q. Calling your attention to exhibit 17, Doctor, I will ask you what it is? [112]

A. That is a lateral view of the right femur, in this we have traction on the tibia, this fracture was close to the knee; there is also a fracture of the patella that shows in here, two large loose fragments here (indicating).

Q. Take a pen Doctor, and make an X where the fragments are.

(Whereupon witness indicated as directed.)

The Court: Yes, they are plain on the exhibit.

Mr. Young: We offer exhibit 17.

Mr. Casterlin: When was number 17 taken?

A. May 27th, 1947.

(Testimony of William E. Greave.)

Mr. Casterlin: No objection.

The Court: It may be admitted.

Q. Go ahead with the next exhibit Doctor?

A. This is exhibit 18, it is of the right femur taken on May 27, 1947 and shows considerable space between the fragments, shows that they didn't get closer; I took lots of different pictures in attempting to get these bones, or rather this bone, these pieces together by force?

Q. This is equipment (indicating).

A. Yes, this is a splint that was under the leg, that is used to vary the angle at the knee.

Mr. Young: I offer exhibit 18.

Mr. Casterlin: No objection.

The Court: Admitted. [113]

Q. Now, Doctor, this exhibit 19, what is that?

A. That is an anterior-posterior view of the right femur, it was taken June 25, or June 23, yes, that is what it is, 1947; this was after one month, this space is here (indicating) and we have new bone formed between this fracture here, this is six weeks after the injury. Because we couldn't close this space I figured there was muscle in there and this would never become strong enough without an open operation; shortly after this I did an open operation?

Mr. Young: I offer exhibit 19.

Mr. Casterlin: Was this taken the 23rd or the 25th? A. The 23rd.

Mr. Casterlin: No objection.

The Court: Admitted.

(Testimony of William E. Greave.)

Q. I call your attention to exhibit 20, what is that?

A. This is a lateral view of the right femur taken on June 23, 1947.

Q. What condition of pathology is shown in that exhibit?

A. Loose pieces and some posterior angulation.

Q. Does it show any union?

A. It doesn't show any union but it doesn't show any dead space, it shows that the femur shortened up some.

Mr. Young: We offer this in evidence.

Mr. Casterlin: No objection. [114]

The Court: Admitted.

Q. Calling your attention to exhibit 21, what is that Doctor?

A. That is a lateral view of the right femur taken in December 1947, it shows both the bolts, that is, it shows two bolts in the femur and there are nine screws I see by this. There is still some posterior angulation. It shows the patella healed but still considerable irregularity of the patella.

Q. Are these screws left in permanently?

A. These screws are a little longer than they should be.

Q. Doctor are these extending into the soft tissue?

A. Yes, sir.

Q. Are they left in permanently?

A. If they cause no pain we leave them in.

Q. You say these are in the soft tissues?

A. Yes, sir.

(Testimony of William E. Greave.)

Q. The patient complains of pain when he sits for some length of time, localizing it to the place the bolts are, now, would they cause the pain?

A. That is possible.

Q. Is it probable, what is the probability of them causing the pain?

A. If he had pressure right over the screws it is probable that it would cause him pain.

Mr. Young: I offer this in evidence. [115]

Mr. Casterlin: No objection.

The Court: It may be admitted.

Q. (By Mr. Casterlin): What date was that taken, Doctor? A. December 8.

By Mr. Young:

Q. Calling your attention to exhibit 22, interpret that for us, please?

A. This is an anterior-posterior view of the right femur taken December 1948, it shows the bolts and screws in place and it shows the loose fragments of the femur still in there.

Q. What is the probability of there being movement of the loose fragments of the femur within the soft tissue?

A. Not much chance of that.

Q. What is the probability of that causing discomfort?

A. It is irregular and if he gets pressure over that irregularity it will cause him pain, yes, that is probable.

Mr. Casterlin: When was that taken Doctor? .!

A. December 8, 1947. !

(Testimony of William E. Greave.)

Mr. Casterlin: You didn't mean to say 1948.

A. No.

Mr. Young: I offer it in evidence.

Mr. Casterlin: No objection.

The Court: It may be admitted. [116]

Q. Doctor, calling your attention to exhibit 23 marked for identification, do the same with that as you have done with the others Doctor, explain that?

A. That is a lateral view of the left femur, it looks like it has grown solidly together; there is an irregularity where one of the fragments has healed along with the rest of the callus.

Q. Is that considered to be a good union?

A. On this view it is good but on the other it doesn't look so good, this shows some decalcification in the knee joint.

Q. What is the significance of that?

A. Due to the non-use we frequently find some arthritis developing following a condition of that kind.

Mr. Young: I offer exhibit 23 in evidence.

Mr. Casterlin: No objection.

The Court: It may be admitted.

Q. Calling your attention to Plaintiff's exhibit 23 please tell us what that is and the date it was taken?

A. Anterior-posterior view of the left femur, it was taken December 8, 1947. This is the last film while he was in the hospital and shows a union at the site of the fracture, the loose fragments all tied in but there is some irregularity at the site of that fracture.

(Testimony of William E. Greave.)

Q. Which is the knee joint?

A. This one (indicating). [117]

Q. This bone goes down,—it is attached to the hip?

A. To the hip, yes.

Q. It seems to be offset,—this seems to be offset here, is that considered a good union?

A. It is a pretty good alignment, there is a little edge there and there is some shortening, some overriding of the fragments; it is considered to be good practice to allow the femur to shorten up rather than build it up.

The Court: What effect does this have, this space here (indicating).

A. That should not cause arthritis, too much angulation will result in arthritis; this is not bad, I don't think it will cause much arthritis in the knees, but along with other defects it is quite probable he will have some arthritis in his knees.

Q. What about the balance of his body, the upper part of his body where you have the upper shaft of the femur thrown off like it is there will it effect him when he walks?

A. No,—of course, he said he has a three-fourths inch shortening, that may cause arthritis in his lower back in time. He has some scarring in the muscle which will result in permanent weakness in the muscle of his thigh, and he doesn't have full flexion of the knee.

Mr. Young: I offer in evidence exhibit 24.

Mr. Casterlin: No objection.

The Court: It may be admitted. [118]

(Testimony of William E. Greave.)

Q. Calling your attention to exhibit 25, what does it show?

A. That is a lateral view of the face, it shows the face pushed in a little bit,—not a very good picture. I would rather have Doctor Poll testify on this.

Q. It is an x-ray of his face. A. Yes, sir.

Mr. Young: I offer it in evidence.

Mr. Casterlin: No objection.

The Court: It may be admitted.

Q. Now, Doctor, the date on that?

A. August 25, 1947.

Q. And what is this?

A. That is a picture of his head, this is the nose in here, and that is about all I can tell about it, Doctor Poll better testify on that.

Mr. Young: I will offer it at this time as exhibit 26.

Mr. Casterlin: What date was it taken?

A. That was August 25.

Mr. Casterlin: That is a lateral or frontal?

A. The last is anterior-posterior number 26, and 25 is a lateral.

Mr. Casterlin: No objection.

The Court: It may be admitted, we will recess at this time for ten minutes. [119]

2:45 p. m. June 10, 1948

Q. I think we finished with the x-rays.

A. Yes, I think so.

Q. When was the last time you saw this patient for the purpose of examination?

(Testimony of William E. Greave.)

A. May 27, 1948.

Q. What condition did you find him in at that time?

A. He was still quite weak in both the legs and the right arm, there was atrophy present, the ulna nerve paralysis in the right and his grip in the thumb in the right hand is not good.

Q. What is the occasion of the atrophy in the right thumb?

A. Injury to the brachial plexus where the nerves come from the spine.

Q. In the right shoulder.

A. Yes, sir.

Q. Injury to the brachial plexus of the right shoulder?

A. Possibly some in the neck. I think he had an injury to the bone in the neck but the x-ray didn't reveal any dislocation of the cervical vertebra but he did have pain in the neck.

Q. Has he marked atrophy in the right hand between the thumb and the index finger?

A. Yes, sir.

Q. Is there a weakening of that hand by virtue of lack of nerve supply? [120]

A. Yes, sir.

Q. State whether or not that is permanent, in your opinion? A. Yes, it is.

Q. With reasonable certainty will that remain with him the rest of his life?

A. It has not improved any in the year, so I think it will be permanent.

Q. What is the prospect of nerve tissue healing?

(Testimony of William E. Greave.)

A. Some nerves heal pretty well if they are put together properly and held together.

A. What about an injury to the brachial plexus?

A. It is difficult to repair that, therefore they do not regenerate.

Q. You are prepared to state that this man has a permanent nerve injury to the nerve supplying the hand, particularly the thumb and the index finger?

A. Not a complete injury but there are some muscles completely paralyzed.

Q. Is the ulna nerve involved?

A. It is,—it is the Ulna.

Q. What effect does that have on the deltoid muscle?

A. He does have an involvement of some of the muscle fibers in the deltoid, due to the rupture on the shoulder.

Q. That is the muscle that abducts the arm?

A. Yes, sir.

Q. The wrist and the arm? [121]

A. Yes, but it doesn't interfere with his function of the shoulder very much.

Q. With respect to his face what condition did you find his face to be in, what condition did you discover his face in upon the original examination?

A. His left cheek was pushed in and the lower lid of his left eye was pulled down, along with the injury to the cheek his nose was pushed over on the right side of his face.

Q. When you examined him you referred him to Doctor Poll?

A. Yes, sir.

(Testimony of William E. Greave.)

Q. He specialized in eye and nose surgery?

A. Yes.

Q. He took care of this surgery?

A. Yes, sir.

Q. The last time you saw him what was the condition of his face that you could observe?

A. His nose wasn't as far as it had been over on his face, and his eye lid seemed to work better, his cheek is about as far in as it was.

Q. There is still some corrective work to be done on his cheek? A. Yes, sir.

Q. Going from the face to the lower part of the body, what did the examination reveal as to the lower part of the body? [122]

A. His lower body.

Q. Yes, sir.

A. There is a good deal of weakness in his legs still; some deformity on the right thigh, surgical scar. The right knees will flex 45 degrees and the left flexes about 60 degrees; the right knee lacks ten degrees of complete extension and the left knee lacks about fifteen degrees of complete extension.

Q. Can this man genuflex, can he kneel down?

A. Not unless he goes on his hands and knees.

Q. I wish you would have him go through this for the Court.

Mr. Casterlin: I shall object to this Court room demonstration.

The Court: Yes, the Doctor can testify as to his injuries, he can tell us about this.

A. He would have to have a chair and then get

(Testimony of William E. Greave.)

down on his knees or on his hands and knees first.

Q. You cannot have him show the limitations here while standing?

A. If he sits down he cannot get his knees to a right angle.

Q. Out in the hall during the recess he indicated the limitation that he has on bending his knee.

A. He can show how far he can bend his knee.

Mr. Young: We haven't a jury and it would not prejudice the defendant.

The Court: Go ahead. [123]

Q. (Asked of Mr. Downum): How far can you bend your knee?

A. (By Mr. Downum): That is as far as I can bend it (indicating).

Q. You used the term per centage to indicate the functional use of the knees that this man has——

A. ——I was referring to degrees in relation to 90 degrees being right angle or quarter circle.

Q. What else did you notice upon your examination?

A. There was considerable crepitation, some grinding sensation in the knees as he bends them. The right patella was quite irregular on palpation, you could feel the roughness when you palpate it. There was some lateral bowing of the femur.

Q. Bowing out to the side? A. Yes, sir.

Q. What was the cause of that, was it due to the fracture? A. Just the way it healed.

Q. And on the left leg?

(Testimony of William E. Greave.)

A. It is three-fourths of an inch shorter than the right.

Q. Assuming this man before the injury was five feet eleven inches and is presently 5 feet nine inches, would that be occasioned by overlapping of the femur bone?

A. Partly and partly because he stands with the knees flexed and the hip flexed, he doesn't stand as straight as he did before. He did complain of sharp pain in the right thigh at times, and his knees hurt when he sits, they stiffen up when he starts to move.

Q. Have you sufficient objective findings to substantiate these claims of pain?

A. I think he does have pain, of course, with the limitation of motion you expect some pain.

Q. The pain he complains of is sustained by clinical findings you have? A. That's right.

Q. In regard to the screws they are out in the soft tissue? A. Yes.

Q. Shown in the x-ray, now, Doctor, is it probable those bolts will have to be removed?

A. I think there is a good chance that it will be advisable to remove them.

Q. Does that necessitate the opening of his thigh and taking them out, a surgical operation?

A. Yes, sir.

Q. What would be the probable hospitalization of having that done?

A. It would be two weeks at least of hospitalization and probably cost \$150.00 or \$200.00.

Q. You have to go down and separate these thigh

(Testimony of William E. Greave.)

muscles and do considerable surgical work in order to retrieve those bolts? A. Yes, sir.

Q. I suppose there is the usual risk involved whenever you go beneath the skin?

A. Yes, sir. [125]

Q. Would the patient have to take a general anesthesia? A. Yes, sir.

Q. Has Mr. Downum arrived at a point where his condition is about fixed so far as physical condition is concerned?

A. I expect he will gain some strength.

Q. So far as utilization of the body is concerned has he just about attained the peak of functional accomplishment?

A. I think he probably will get increased motion in his knees.

Q. To any appreciable extent?

A. Yes, I think he will get them to 90 degrees in time.

Q. How long? A. Five or six months.

Q. Well it has been,—he was injured in May of last year, it is now the middle of June, about a year since the injury and he hasn't shown much improvement so far as this condition is concerned; you think five or six months will bring him to 90 degree use of his knees?

A. He didn't start to use his knees until December. I think that scar tissue will stretch out and his muscles will improve over another five or six months period.

Q. Doctor, these injuries, are they permanent

(Testimony of William E. Greave.)

and will they remain with him the rest of his life?

A. Yes, he will substantial permanent disability.

Q. This man was a farmer and common laborer, not possessed of any trade; a hard working man; farming and hard labor, [126] the only thing he is trained for. Now, what is the percentage of total disability is permanent disability, in your opinion?

A. I would estimate it as seventy-five per cent.

Q. Seventy-five per cent of total?

A. Yes, sir.

Q. That is a permanent situation that will remain with him the rest of his natural life?

A. Yes, sir.

Q. That is reasonable certain that it will remain with him the rest of his life? A. Yes, sir.

Q. What factor do you take into consideration in making that assertion?

A. He would have difficulty in competing for most jobs with able bodied men; there are some low paid jobs where he can perform almost as good as anybody else. With the visual disturbance he has, he should not drive a truck on the highway, nor a car, and in his condition he would have difficulty in getting down to milk a cow or pick spuds.

Q. What about walking over uneven ground, what would be his ability to do that?

A. He will have some difficulty.

Q. Could he go out and work eight hours a day as a swamper in the woods? [127]

A. No, sir, I don't think so.

Q. Could he go out and work plowing or driving a truck for an appreciable period of time?

(Testimony of William E. Greave.)

A. He is liable to have difficulty if he does. I never drove a truck myself, but I am sure he would have difficulty.

Q. He could probably run an elevator or be a bailiff in a Court room or something that didn't require physical labor? A. That's right.

Q. So far as working at hard labor he is through?

A. I think for most types of hard manual labor he would not be able to compete with able bodied men.

Mr. Young: That is all, you may examine.

Cross-Examination

By Mr. Casterlin:

Q. Calling your attention to exhibit 16 and exhibit 23 both being x-rays of the left femur, and exhibit 15 also. I will ask you to state if in your experience as an orthopedic physician and surgeon, the progress made between May 27, when the first of those x-rays was taken and December, is the expected progress?

A. Yes, the union is rather slow but when we get a severe injury of this nature we expect to blood supply to be injured and we expect slow healing.

Q. Does this x-ray show an exceptionally good recovery?

A. It is healed, you have a solid union, the injury to the [128] bone made a good recovery, of course he will still have some spikes sticking out of the bone.

Q. Taking into consideration the nature of the

(Testimony of William E. Greave.)

break it was a remarkable recovery? A. Yes.

Q. Calling your attention to exhibits 18, 19 and 22, which are x-rays of the right femur taken in May and June, what do you say as to the extent of the recovery there?

A. It is healed solidly and in pretty good alignment.

Q. Didn't the patient make a remarkable recovery with respect to the right femur?

A. It is a recovery, but I would not say remarkable.

Q. It is good?

A. He has a solid bone union.

Q. So far as the right femur is concerned, you don't expect much difficulty with that; you don't expect the patient will have much difficulty with the use of the right leg?

A. I think he is apt to have some arthritis in the right knee, he had a lot of scarring before I operated and there might be more if there is another operation.

Q. What scarring was there before you operated?

A. You cannot smash up the bone and muscle without some scarring.

Q. The patella on the right knee was injured?

A. Yes, sir.

Q. What about the recovery with respect to that? [129]

A. Well, he has some roughness both in the joint and on the surface.

(Testimony of William E. Greave.)

Q. Tell us whether roughness of the patella is common or uncommon in the human race?

A. Of course, patellas vary but he has an abnormal roughness in the joint and on the surface.

Q. Would you say that men never have roughness of the patellas? A. No, sir.

Q. Men with rough patellas are working in gainful occupations? A. Yes, sir.

Q. Respecting the arthritis or the arthritic condition due to the break of the femur,—arthritis is common in the human race, is it not Doctor?

A. Yes, sir.

Q. And is caused not alone by trauma but there are other causes? A. Yes, sir.

Q. People with arthritic condition are engaged in gainful occupations? A. Yes, sir.

Q. An arthritic condition resulting from a break of the femur would not be permanently and totally disabling? A. It might be.

Q. Totally disabling?

A. Yes, it might be.

Q. From this injury? [130]

A. I don't think arthritis is the entire cause of his difficulty but it does contribute to the disability and it may become worse.

Q. People who have never suffered a break of this kind sometimes have arthritis?

A. Yes, sir.

Q. And they are gainfully employed and engaged in farming with only an eighth grade education?

(Testimony of William E. Greave.)

A. Farmers or anybody engaged in heavy work who suffer slight injuries repeatedly suffer arthritis as they get older; this injury makes him get older faster.

Q. But with the same condition in two bodies you would not say that both could not follow gainful occupations. What I am trying to get at is that assuming that the arthritic condition developed, as it might, would that prevent him from following a gainful occupation?

A. It might be the cause of his being unable to work.

Q. Would you say from a medical certainty that would prevent him from making a living following a gainful occupation?

A. I cannot say that definitely.

Q. Now, this neck condition, you didn't find any trouble in the neck?

A. The alignment of the vetrebra, the natural curve is not present, I didn't find anything alarming on my examination.

Q. This anemic condition, what was that due to?

A. Loss of blood following the injury and the loss of appetite.

Q. Could that condition have existed prior to this accident?

A. He might have had something to interfere with his appetite.

Q. This anemic condition, you wouldn't say as a medical certainty was due to the accident?

A. I thought it was at that time.

(Testimony of William E. Greave.)

Q. Do you now? A. Yes, sir.

Q. Can you say as a medical certainty?

A. Nothing is certain.

Q. That is found in people who have had no accident of this kind? A. Yes, sir.

Q. Certain types of anemia might be built up in a short period of time under certain diet?

A. His blood can come back pretty well after he gets to eating and after a transfusion.

Q. From that anemic condition there has been a complete recovery? A. I think so.

Q. Now, those screws in his leg, those can be removed? A. Yes, sir.

Q. You were asked about that and you said the cost would be \$150.00?

A. That would be for the hospital.

Q. How much for the operation? [132]

A. Another \$150.00.

Q. You mentioned in connection with that, that there would be some risk? A. Yes, sir.

Q. What would the risk be?

A. He might bleed to death or die under the anesthetic or from infection following the operation.

Q. What is the probability of that?

A. Not very much but that is always present.

Q. The probability of expiring from that kind of an operation is pretty slight.

A. Yes, sir.

Q. And by the removal of these screws the pain he might suffer as a result of pressure on the screws would be relieved?

(Testimony of William E. Greave.)

A. Yes, sir, but he still would have the roughness on his femur; and he would still have some scar tissues when I got through.

Q. Would that scar tissue prevent him from engaging in a gainful occupation within the limits of his ability? A. No, sir.

Q. Now, the question of the length of the legs. I think you said that both of his legs were shortened?

A. Yes, sir.

Q. If they both were equally shortened would that cause any severe injury?

A. No, no severe injury, but it would interfere with the [133] balance of the muscles.

Q. In time would the muscles compensate?

A. Probably to a large extent.

Q. They would compensate better with exercise than without exercise? A. Yes, sir.

Q. Doctor isn't it a fact that with this patient the more exercise the more improvement; the more he moves around the greater the improvement?

A. If he moves too much he wears out his knees faster and he may develop arthritis quicker.

Q. At the same time, these weak leg muscles, would not they return by activity rather than by non-activity? A. Activity within reason.

Q. These weak leg muscles,—how long was this man in a cast?

A. He was in bed for at least six months.

Q. During what portion of that time was he in a cast? A. I don't know.

Q. Isn't it a fact that being in a cast and being

(Testimony of William E. Greave.)

confined to bed would make the leg muscles weak?

A. Yes, sir.

Q. Whenever there is musculature weakness by being confined to bed or inclosed in a cast, activity will build back the muscles faster than non-activity?

A. Yes, sir. [134]

Q. Doctor, people who have been bedridden during medication or in a cast for a long time,—isn't it good practice to prescribe exercise, work and mobility?

A. Yes, sir.

Q. Now about the knee?

A. Yes, sir.

Q. You say when you last examined him you found the right knee flexed 45 degrees and there was a ten degree loss from complete extension?

A. Yes, sir.

Q. The normal you take to be 90 degrees?

A. Normally it flexes more than 90 degrees.

Q. How much?

A. About 135.

Q. When you spoke of his knee flexion you found it about how much less than normal?

A. 90 degrees less than normal.

Q. Exercise will also improve that?

A. I think it will be improved in time.

Q. And the left leg and the knee flexion that would be the same as the right one; that would improve with exercise and activity over a period of time?

A. I expect some improvement.

Q. Now going to the shoulder injury, you testified that as a result of the injury to the shoulder some atrophy of the muscles of the right hand developed; where is that muscle? [135]

(Testimony of William E. Greave.)

A. In the web,—the web of the thumb. He cannot ebb and abduct his finger?

Q. How about bending and closing his fingers?

A. He does that.

Q. This abducting of the fingers what is your prognosis on that?

A. I don't think it will change,

Q. Why?

A. Because it has been a year and no improvement in the nerve at this time.

Q. That is a result of a nerve injury?

A. Yes, sir.

Q. Did you find that nerve injury consisted of a severance of the nerve?

A. No, I don't think it was cut, I think it was torn. I don't know just where it was torn, I didn't see the nerve, I saw the result of the injury.

Q. You say it was not due to a severance or cutting of the nerve?

A. I think it was torn.

Q. Where it is injured in that manner isn't there a tendency to pull itself back up again?

A. If the nerve is severed or cut and sewed back there is a chance for peripheral nerves to regenerate.

Q. I thought you said it was not cut, that there was no cutting, that it was torn? [136]

A. It was torn.

Q. What do you mean by torn?

A. I think it was pulled apart, pulled off where the nerve comes of the neck in the brachial plexus.

(Testimony of William E. Greave.)

Q. That is no chance for healing of that so that a complete extension of the fingers will result?

A. Some regeneration, yes, but I doubt that it will make any real difference.

Q. Assuming there is no regeneration, what effect does that have in the use of his hands in gainful occupations?

A. He won't use his thumb as well, and he won't be as dexterous in fine work.

Q. Isn't it true that a man with a right thumb amputated can be engaged in gainful occupation?

A. Yes.

Q. And isn't it true that there are many men with their right thumb amputated engaged in gainful employment? A. I think there are.

Q. Isn't it true that men with thumb and index fingers amputated are gainfully employed?

A. Yes, sir.

Q. Isn't it true that a person with no fingers except his index finger and thumb could still engage in gainful occupations? A. Yes, sir. [137]

Q. You stated that his disability was seventy-five percent total for farming, do you think there are any other operations or occupations this man could follow? A. Yes, sir.

Q. And could follow gainfully?

A. Yes, sir. .

Q. So if he entered some other occupation he would not necessarily be seventy-five per cent disabled?

A. Possibly not, for other occupations.

Q. Now, Doctor, of course, you are familiar with

(Testimony of William E. Greave.)

the rehabilitation of the boys for the wars by education? A. Yes, sir.

Q. Isn't it a fact that there are many occupations that this man could engage in, being in the condition you found him in?

A. There are several occupations he could be employed in.

Q. That is taking into consideration that he has only an eighth grade education and he has been primarily engaged in farming? A. Yes, sir.

Q. You testified that there are some jobs that he can perform as good as anyone else?

A. Probably.

Q. When you say seventy-five per cent disability, that has particular reference to farm activities? [138] A. Yes, sir.

Q. Did you have anything to do with the facial condition?

A. I just called Doctor Poll to take care of that.

Q. This diplopia, that is limited to his downward and right and left vision?

A. I didn't testify to that.

Q. Do you know how extensive that is?

A. I never tested him as to that.

Q. This weakness in the right arm, how extensive is that weakness?

A. That weakness is generally or chiefly confined to his hand, inability to use the thumb, to grab with the fingers, this way.

Q. Closing his hand, such as lifting a basket of eggs, he could do that?

(Testimony of William E. Greave.)

A. He can flex the fingers pretty well.

Q. No weakness in the grabbing, the opposing fingers and the thumb?

A. Yes, there is a weakness.

Q. If he didn't use the thumb but just the fingers to complete the grab, he could lift a weight?

A. That's right.

Q. This crepitation in the knees, is that peculiar to this person?

A. Lots of people have crepitation. [139]

Q. And those people are engaged in gainful occupations? A. Some of them.

Q. Many occupations are open for them that is gainful?

A. Conditions may keep people working with pain in the knees. However, if this man abuses his knees he is apt to develop more pain in his knees.

Q. This lateral bowing of the left femur that was due to the fracture? A. Yes, sir.

Q. Would the bowing of the femur cause a man to be permanently disabled?

A. If it was great enough.

Q. What degree of bowing does this plaintiff have? A. Not severe.

Q. Is it greater than we have in a lot of buckaroos or race horse riders?

A. It is more than average, yes.

Q. More than you find in broncho busters?

A. Yes, unless the broncho buster had a fractured femur or had rickets when he was young.

(Testimony of William E. Greave.)

Q. Would this bowing cause this man to not be able to follow a gainful occupation?

A. Not in itself.

Q. Which leg is shorter, Doctor?

A. The left. [140]

Q. That left leg being three-quarters of an inch shorter than the right, what effect would that have?

A. It causes some strain on the lower back and might result in arthritis in his lower back.

Q. Is there a proper treatment to correct that?

A. The simplest thing is to build up the left heel.

Q. That removes any probability of injury to the spine or back?

A. It decreases the strain on the spine.

Q. Many people that complain of pain in the back have been completely cured by that treatment?

A. They have been relieved.

Q. Yes, there has been relief? A. Yes, sir.

Q. That has been so complete that they have been relieved of pain entirely? A. Yes, sir.

Q. Would his height,—his change in height have anything to do with his following a gainful occupation? A. I don't think so.

Q. Now, to the final question, what is this man's percentage of disability with respect to gainful occupation that he could follow?

A. Well, as a lawyer I don't think this would interfere with his work, but as a farmer it is a great handicap. [141]

Q. What is his percentage of disability with re-

(Testimony of William E. Greave.)

spect to occupations which he can follow. You testified there were some?

A. He could sell pencils or shoe strings probably as well as anyone else. He could operate an elevator pretty well with a built up shoe and with a seat in the elevator. He would get tired, but he could do pretty well.

Q. What about driving a truck?

A. He would have difficulty getting off and on the truck. I think he would be able to start the thing and work the levers and brakes.

Q. How about stationary engineer?

A. He could probably run a stationary engine if he was educated for that work, he may do it pretty well.

Q. Do you say that he could not learn to be a stationary engineer?

A. No, I think he is capable mentally.

Q. And what about a hoist-man?

A. He could do that.

Q. How about a stock-room checker?

A. He would have some difficulty being on his feet all the time.

Q. What about a time-keeper?

A. I think he could work as time-keeper if he didn't have to go around checking on a big plant.

Q. So there are numerous occupations besides selling pencils, popcorns and chewing gum on the street corner that this man could engage in?

A. Yes, there are.

Q. You have a fixed fee for testifying in this case do you Doctor?

(Testimony of William E. Greave.)

A. I haven't put in any. I made my fee for the entire case to this time at \$700.00.

Q. Does your pay for testifying here depend on the outcome of this case? A. I believe so.

Mr. Casterlin: That is all Doctor.

Redirect Examination

By Mr. Young:

Q. Your fee for the care of this man is \$700.00?

A. Up to this time.

Q. Do you think that is reasonable considering the nature of the treatment and the time involved?

A. Yes, sir.

Q. You have had considerable experience in industrial work concerning the employment of men by corporations, that is as to the physical condition and ability of the men at the time they are employed?

A. I know something of that, yes.

Q. Is it a fact that the large employers won't employ men [143] broken up in body for any kind of a job?

A. That is a risk they will not take. There is a risk in employing men at any time, and this is greater than they will take.

Q. It was suggested that my client could become a stationary engineer or a hoist-man, possibly having in mind some building project,—Now, Doctor, from your experience in the industrial field do you know whether this man would be able to work with able-bodied men and do the work of an able bodied man in that field.

(Testimony of William E. Greave.)

Mr. Casterlin: We object to that as being speculative.

Mr. Young: Yes, perhaps it is, I think his Honor will take judicial notice of that.

The Court: Yes, this objection is sustained.

Q. This seventy-five per cent of total disability goes to the general picture of hard manual labor rather than limited just to farming?

A. Yes, sir.

Q. Anything that would require physical strain on Mr. Downum's part, he cannot do, is that correct?

A. Yes, sir, it is correct.

Q. And if it required no physical strain he could do it?

A. That's right.

Mr. Young: That is all. [144]

The Court: Doctor, would you be able to give an opinion as to the percentage of disability this man would have generally for all kinds of work knowing him as you do. I take it there would be some disability for any kind of work?

A. Yes, sir, he is going to have difficulty in amusing himself even; and to do any kind of work——

The Court: Doctor, if you were fixing a percentage such as Doctors fix in the young men at the veterans hospitals, in fixing the percentage of disability for the Government such as they do, what would you fix? That is also taking into consideration all the things that could asked you about?

A. Well, the Veterans administration seem quite generous in most cases. I would say in this man's case it is sixty to seventy-five per cent.

(Testimony of William E. Greave.)

Q. The Court: That is the amount of disability he will have? A. Yes, sir.

The Court: I take it he was totally disabled all the time he was under your care?

A. Yes, sir.

The Court: What do you consider to be his disability at this time, what is the percentage of disability to work right now? [145]

A. I think it is over seventy-five per cent right now; it is eighty percent or more now. He cannot work a full eight hours, he cannot be on his feet for any length of time, and he cannot be on the job at all for a full working shift.

Q. The Court: What about a hundred per cent disability, how long did that exist after his injury?

A. He could do light part time work for the past two months.

The Court: That is all I have to ask.

Recross-Examination

By Mr. Casterlin:

Q. Mention was made of physical stress or strain, and what the effect would be on this man; is there any occupation in which there is no physical stress or strain?

A. None as I know of.

Mr. Casterlin: That is all.

Mr. Young: That is all, Doctor.

DR. ROBERT H. POLL

being called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

(Testimony of Dr. Robert H. Poll.)

Direct Examination

By Mr. Young:

Q. Dr. Poll, you are a licensed physician?

A. Yes, sir.

Q. Licensed in the State of Washington?

A. Yes, sir. [146]

Q. Practicing in Spokane? A. Yes, sir.

Q. Do you specialize in any branch of your profession? A. Yes, sir.

Q. What is that?

A. Disease of the ear, nose, eyes and throat.

Q. Briefly, Doctor, relate your education and qualifications? A. I am——

Q. Let me ask, you are a graduate from medical school? A. Yes, sir.

Q. And you did special work after graduation?

A. Yes, at the University of Iowa and Western Reserve in Cleveland.

Q. And you took special work there in the field in which you are applying yourself?

A. That's right, yes, sir.

Q. You saw Raymond Downum at the request of Doctor Grieve? A. Yes, sir.

Q. Give the history as you made it, or as you have it, you may look at your notes to refresh your recollection?

A. I saw Mr. Downum on the 29th of May, 1947, at the request of Doctor Grieve. The patient was in bed at the Sacred Heart hospital with his legs in a cast and he appeared to be very ill. He complained, with regard to my particular field, of

(Testimony of Dr. Robert H. Poll.)

suffering an injury to the head in which a crushing blow [147] was dealt on the left cheek resulting in double vision and a deformity of the nasal pyramid and obstruction in breathing. Examination revealed a depression of the left cheek; a dislocation of the nose to the right; there was obstruction to the breathing; and this double vision and our other diagnosis was comminuted fracture, nasal fracture and depressed fracture of the zygomatic bone in the cheek, nerve injury to the muscles moved the left eye.

Q. What treatment did you give?

A. I realigned the nasal fragments and held them in position with plastic cast. I felt that was all I should do at that time because of his general condition and the area involved. I didn't feel that the depressed fracture in the cheek should be attended when I first saw him.

Q. On that occasion it would be your judgment that he might have further shock by any other treatment?

A. Yes, he didn't seem to be a candidate for greater treatment than realigning the nose at that time.

Q. Calling your attention to Plaintiff's exhibit 27, does it have a picture of your patient in that group. Do you recognize him in that picture?

A. This could be Mr. Downum.

Q. Assuming that it is, does the nose——

Mr. Casterlin: We object to going into that picture until it is admitted in evidence. [148]

The Court: The Court will strike it if it is not connected up. You may continue.

(Testimony of Dr. Robert H. Poll.)

Mr. Young: This picture was taken about four years ago. I offer it in evidence at this time?

Mr. Casterlin: No objection if they know when it was taken.

The Court: It may be admitted.

Q. Assuming this is a picture of Mr. Downum (indicating) is his nose in midline at that time, in that picture? A. Yes, it is.

Q. When did you last see Mr. Downum?

A. The 28th of May, 1948.

Q. Did you observe his condition at that time?

A. Yes, I did.

Q. And you have seen him here today?

A. Yes, sir.

Q. What is the condition of his nose with respect to being in midline?

A. The alignment of the nose didn't stay where I put it at the time of the reduction of the fracture; in approximately two weeks it had shifted itself to the present position.

Q. Will you describe it so, if anyone happens to read the record they would know what we are talking about; what position is the nose in now?

A. Definitely to the right, especially in the upper half, from [149] the elongation of the left side of the nasal pyramid.

Q. What was the cause of that shifting?

A. Shifting to its present position?

Q. Yes.

A. I feel that the nose shifted back to its present position because of the spring in the nasal septum which sprung it out of line after it was once set.

(Testimony of Dr. Robert H. Poll.)

That septum condition has since been corrected surgically because it was obstructing his breathing.

Q. What did you observe about the tear duct?

A. Our attention was called to the tear duct some weeks after I first saw him. He said that the tears ran down his cheek on the left side and there was quite a bit of mucous or puss-like discharge in the eye. I attempted to irrigate which showed that it was occluded.

Q. By occluded you mean it was plugged?

A. Yes, sir.

Q. What did you do by way of opening that tear duct?

A. We made a new opening between the tear sac, which is located in the depression on the side, here in the narrow part of the nose—we made a new opening between that sac and inside of the nasal vault. That is called anastomosis.

Q. What did you observe in connection with the diplopia?

A. It was present as the patient looked downward.

Q. Is that something that will remain with him the rest of his [150] life? A. I think it will.

Q. Now the condition of his nose, what is necessary to put the nose in midline, to straighten up his appearance?

A. It will have to be refractured and held in position by more positive appliance than I was able to use the first time.

Q. There is some element of risk in that operation? A. It is not severe.

(Testimony of Dr. Robert H. Poll.)

Q. What would the time of hospitalization be?

A. Minimum of a week.

Q. And what would the probable cost be?

A. \$150.00 to \$200.00 I cannot say exactly.

Q. There would be the cost of anesthesia?

A. Yes.

Q. And bandages, medicine, X-ray and operating room?

A. Yes, sir.

Q. What would your fee be for doing the correction?

A. Our fee would be around two hundred dollars?

Q. Has he functional disability by reason of the nose in its present condition?

A. No, I don't think he has a great element of functional disability in his nose, but it certainly is a cosmetic defect of considerable magnitude?

Q. What does the diplopia indicate—is that a permanent condition?

A. Yes, sir, I think so. [151]

Q. In all reasonable certainty is that permanent?

A. Yes, sir.

Q. What is the effect of this diplopia in the man's ability to work?

A. Well, at occupations requiring good vision, it is a very marked disability.

Q. What is that?

A. When he is looking below the midline he sees two of everything instead of one. It results in confusion and the possibility of, say, pushing the wrong button, if he were handling something like that.

Q. He might make a first-class stationary engi-

(Testimony of Dr. Robert H. Poll.)

neer was suggested here, now, Doctor, would that play a part in mechanics, in handling machines or any kind?

A. I wouldn't consider him a good candidate for that job.

Q. What about driving trucks along the highway for commercial purposes, could he get a license for that?

A. I don't know the state laws with regard to one-eyed persons but I don't think he would be able to get a license.

Q. It would not be a safe thing?

A. His judgment of distance would be impaired and his depth perception would be bad.

Q. Doctor, do these films indicate very much—strike that—calling your attention to exhibit 25 what is shown in that film? [152]

A. These are pictures on the 25th of August, and were taken to rule out the presence of sinus infection. He had a draining fistula and we didn't know whether it was coming from the sinus or whether it was connected with his tear duct which we subsequently operated and that promptly healed. These were taken for sinus pathology. You see this separation at this area here (indicating) this is the orbit where the eye is; this you can see is pulled down this way—this side here is pulled down. You can see this shape is not the same as on this side. This is the injured side; there is a suggestion of shifting of the bony shadows to this side.

Q. The one you were referring to is exhibit 26?

(Testimony of Dr. Robert H. Poll.)

A. Yes, sir.

Q. Now exhibit 25?

A. It doesn't show much in this view. These are sinus pictures and I don't think it has any value from the standpoint of the fracture.

Q. Calling your attention to exhibit 28 marked for identification, what does it show in the way of pathology?

A. It shows the displacement of the zygome on the left side.

Q. That is the cheek bone?

A. Yes, sir, the one under the eye on the left side.

Q. When was the last time you examined your patient, Mr. Downum? A. May 28, 1948.

Q. What condition did you find him in then with respect to the diplopia, or did you give him an examination to that extent?

A. This diplopia was for all purposes exactly the same as when I first studied him at my office some time in December.

Q. The condition of his nose?

A. His nose was the same on discharge from the hospital.

Q. Did you observe some scarring about his face? A. Yes, sir.

Q. What did you observe as to that?

A. I observed a scar in his forehead; a healed scar on his left cheek where the draining fistula was present before we operated his tear sac.

Q. Do you recommend that this nose be refrac-

(Testimony of Dr. Robert H. Poll.)

tured and put back in position? A. Yes, sir.

Q. What occasions that recommendation?

A. Because I consider the nose in its present condition highly disfiguring.

Q. That is a disability?

A. Yes, I consider it a disability.

Q. You did state that his condition as far as the eyesight—the diplopia is concerned, I think you said you regard that as permanent and will remain with him the rest of his life?

A. Yes, sir. [154]

Q. These other conditions you testified to are permanent subject to the modification that they might yield to surgery? A. Yes, sir.

Q. Are you prepared to testify as to what in your opinion is the permanent disability of this man for general purposes, so far as occupations are concerned basing your testimony upon knowledge of him as a patient you have seen and observed?

Mr. Casterlin: Objected to on the ground that this Doctor's examination doesn't run to the entire disability but is confined to the eye, ear, nose—just to the facial condition.

The Court: Have you studied his general condition? A. No, sir, I haven't.

The Court: Objection sustained.

Mr. Young: That is all, Doctor.

Cross-Examination

By Mr. Casterlin:

Q. Doctor Poll——

The Court: Just one question before you start

(Testimony of Dr. Robert H. Poll.)

your cross-examination Mr. Casterlin. Doctor, this disfigurement around his left eye, can that be corrected?

A. That is a result of a depressed fracture of the cheek bone which I didn't deem wise to elevate when I first saw [155] him because of his condition at that time. At this time action can be taken by placing a graft of tissue under the skin, the bone will always be down.

The Court: There will always be some disfigurement?

A. Yes, but he can be made considerable better, that is, considerable improvement can be made but it will not change unless he has some building up to supply more tissue.

Mr. Young: Now you may examine.

Cross-Examination

By Mr. Casterlin:

Q. Do you do that kind of work?

A. Some type of plastic surgery.

Q. This kind of operation, the lifting of muscles of the left side of the face?

A. He is not a candidate for muscle lifting.

Q. How would you remedy that?

A. I feel that an implant of faccia from some other part of the body or a plastic implant.

Q. Could you do that? A. Yes, sir.

Q. Did you include that in the cost you gave in response to Mr. Young's question?

A. No, sir, my fee was only for straightening the nose. [156]

(Testimony of Dr. Robert H. Poll.)

Q. What would be a reasonable charge for correction of the depression on the left side of the face?

A. I think about \$200.00 would cover that procedure for the surgeon's fee.

Q. Is there any reason why that correction could not be made at the time the nose correction is made?

A. I don't think it should be done at the same time because a refracture of the nose may have to be done by chiseling and I don't want to put a graft in loosened tissue where there is apt to be a hemorrhage. It could be done later.

Q. And would the question of hospitalization enter into that?

A. It should not be at the same session.

Q. How about the nasal operation with the operation for removing the screws from the plates in his legs?

A. That could be at the same time, yes.

Q. There would be only one hospital charge for that?

A. Yes, sir.

Q. The tear duct, that has been corrected?

A. Yes, sir.

Q. The nose and face, the diplopia, there has been some question about the activity in which he could engage because of that, now, would crusted lense over that eye correct that?

A. The blinding of one eye would stop the diplopia; if you take the eye out it would also stop it.

Q. Stationary engineer, he could perform that work if he had [157] a glazed or crusted lense over his left eye without any trouble?

(Testimony of Dr. Robert H. Poll.)

A. I don't subscribe to that "without any trouble" his judgment is not as good with one eye as with two. However, he does not have any serious handicap in using the one eye.

Q. There are lots of one-eyed people gainfully employed? A. Yes, sir.

Q. They carry on with one eye?

A. Yes, sir.

Q. So that if this young man was engaged and had trouble, then the covering of that eye with a glazed lense would permit him to go ahead?

A. Yes, he would eliminate the diplopia and if his task did not require too great a perception of distance and so on he could carry on.

Q. There can be no muscular correction so this diplopia will be cured?

A. I don't feel that muscle surgery is much benefit in this paralytic squint—that is a term we apply.

Q. That is the cause of diplopia?

A. There are devices and procedure designed to correct that but they do not yield enough results to keep him from seeing double. I don't think it would be satisfactory. [158]

Q. How long a period would it take to perform this nasal operation and correct the facial condition?

A. Two weeks with the nose and perhaps be in the hospital four or six days with the other procedure.

Q. If he started in now with these corrections, in the course of three or four months these opera-

(Testimony of Dr. Robert H. Poll.)

tions would be concluded? A. Yes, sir.

Mr. Casterlin: That is all, Doctor.

Redirect Examination

By Mr. Young:

Q. Would you guarantee the result of this?

A. No, sir.

Q. You would pursue certain technique and hope to obtain certain results?

A. Yes, I would, and I would take precaution to keep that nose from slipping again.

Q. You could build up the depression in his cheek by putting in an implant of fascia or plastic.

A. Yes.

Q. When you do that you are encountering certain muscles involved in that area?

A. Yes, sir.

Q. One of the greatest problems that confronts a surgeon—a plastic surgeon is the encountering of muscle. [159]

A. Yes.

Q. Because they don't always respond equally?

A. Yes.

Q. You increase the dead scar tissue when you do that operation?

A. Yes, sir.

Q. And the likelihood and work involved in this muscle lifting and inserting the implant, is there a likelihood of getting greater disfigurement than already exists?

A. The deformity or disfigurement exists and if the likelihood of increasing the deformity outweighs the chances of improvement I wouldn't touch him.

Q. You have seen cases of physicians in good

(Testimony of Dr. Robert H. Poll.)

faith undertaking to improve a cosmetic condition by implant or graft of some foreign sterile matter in a depression and come out with a result that was less complimentary than when he went in?

A. It can be that way.

Q. It is not a simple matter when you operate and it involves those muscles mentioned?

A. That's right.

Q. (By Mr. Young): That is all.

Recross-Examination

By Mr. Casterlin:

Q. You wouldn't hesitate to attempt those two operations, the nasal and facial operation on this patient? [160]

A. No, I wouldn't. I might want some help with the graft, but so far as the reconstruction of the nose was concerned I would go ahead with that.

Q. There was mention that there might be worse disfigurement, and you said that you wouldn't attempt it if it would result in worse disfigurement?

A. I would attempt it. I would be hopeful of improvement.

Q. Your judgment is that there would be improvement?

A. Yes, I believe there would be.

Mr. Casterlin: That is all.

Redirect Examination

By Mr. Young:

Q. Doctor Poll, in your opinion without that type of operation this disfigurement of his is permanent? A. Yes, sir.

(Testimony of Dr. Robert H. Poll.)

Q. And it would be with him the rest of his life? A. Yes, sir.

Q. If he is to be rid of it he has to undergo what is indicated here? A. Yes, sir.

Q. And take his chances? A. Yes, sir.

Mr. Young: I think that is all, Doctor.

We had Doctor Lynch, a nerve specialist examine this man and he rendered a bill for \$25.00. [161]

Mr. Casterlin: I admit that if Doctor Lynch was present he would testify that he performed the service and that a reasonable charge for the same was \$25.00.

Dr. Grieve: I called him to try to determine whether this nerve injury was due to the fracture and see if we could do anything about it.

Mr. Young: Was the charge reasonable?

Dr. Grieve: Yes, it was.

RAYMOND C. DOWNUM

Being recalled, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. Mr. Downum, have you attempted to do any light work since this accident?

Mr. Casterlin: Objected to as incompetent, irrelevant and immaterial and it invades the province of the Court?

Q. I call your attention to the fact that you said that you thought you could be a service station attendant, what effort did you make along that line?

A. Yes, I figured that I could do that kind of

(Testimony of Raymond C. Downum.)

work and I tried to remove a tire from the frame and I knew right away that I wouldn't be any good around a service station. [162]

Q. What difficulty did you have in removing the tire?

A. I couldn't get the tire tool down into the rim to loosen it up.

Q. Was it because you couldn't bend your knee?

A. Partly and because I couldn't use my foot.

Q. What was your model A truck worth before the collision? A. \$150 to \$175.00.

Mr. Casterlin: I admit its value at the amount alleged \$150.00.

Q. And it was completely destroyed?

Mr. Casterlin: I admit that it was destroyed.

Mr. Young: That is all, Mr. Downum. You may examine, Mr. Casterlin.

Cross-Examination

By Mr. Casterlin:

Q. On this particular date when you were driving toward Bonners Ferry you stated that you were driving slowly, why were you driving slowly?

A. On account of the dusty condition.

Q. I think you testified that you didn't see this other car until it was about two car lengths from you? A. Yes, sir.

Q. Why was that?

A. On account of the dust.

Q. You testified that there were other vehicles passed you [163] that morning? A. Yes, sir.

Q. Had you passed any car before this accident?

(Testimony of Raymond C. Downum.)

A. I didn't pass any. I met three vehicles coming from Bonners Ferry.

Q. How long a time expired between the time when you passed, or when you met the last vehicle and the time the accident occurred?

A. I don't know. I never thought about that, but it was possibly three or four minutes.

Q. Was that a Government car?

A. Yes, I think so.

Q. So that the car with which you collided was following in the middle of a line of cars, or a procession of other cars?

A. I don't know.

Q. Because of all these cars together, a dust cloud had formed—a continuous cloud of dust along the road?

A. That's right.

Q. The wind was blowing from the south; that would blow the dust off the side of the road. Was it clear enough so you could see distinctly the shoulder?

A. Absolutely, yes.

Q. You didn't have any difficulty with that?

A. No, sir. [164]

Q. Your vision was limited to about thirty-two or thirty-five feet?

A. Yes, sir.

Q. Did you have lights on?

A. No, sir.

Q. Did this Government car have its lights on?

A. No, sir.

Q. Do you know the rate of speed it was going?

A. No, sir.

Q. If it had not been for the dusty condition there would not have been an accident?

(Testimony of Raymond C. Downum.)

Cross-Examination (Continued)

By Mr. Casterlin: [167]

Q. I take it that up until the time you sold your farm you were working for yourself for about five years? A. That's right.

Q. When did you sell your ranch?

A. I think it was about the 5th of March last year.

Q. In 1947? A. Yes, sir.

Q. After that you went to work on the dikes up there and also this other employment at \$1.25 an hour? A. Yes, sir.

Q. Was that steady employment?

A. The dike work wasn't. That was just emergency, I helped during the high water.

Q. The other employment was steady work?

A. Yes, sir.

Q. Where was that? A. At Boyd-Connley.

Q. What were you doing there?

A. Around the seed-house at that time.

Mr. Casterlin: That's all.

Redirect Examination

By Mr. Young:

Q. Mr. Downum, you stated in answer to Mr. Casterlin that if it hadn't been for the dust there would not have been an accident. Do you mean that, did you understand the question? [168]

A. Well, if I had saw that truck a hundred feet away I would have went over the bank.

Q. You would have gone over the bank?

A. Yes, to keep from hitting it.

(Testimony of Raymond C. Downum.)

Q. If the truck has been operating as you were operating and watching its side of the road there would not have been an accident, would there?

A. That's right, there wouldn't.

Q. There wasn't anything about the dust that compelled the driver of the truck to run on your side of the road?

A. No, not that I could see.

Q. He had as good an opportunity to drive as carefully as you did?

A. That's right.

Q. Doctor Poll rendered you a bill for \$300.00. Is that bill paid?

A. No, sir.

Q. He is billing you for \$300.00?

A. That's right.

Mr. Casterlin: I will admit if the Doctor were here testifying he would testify that the services he rendered this plaintiff was worth \$300.00, and I will make the same admission as to Doctor Grieve's bill.

Mr. Young: I think the Court takes judicial knowledge or notice of the mortality table. It is alleged that he had a certain expectancy of life.

Mr. Casterlin: It is understood and agreed that the Court takes judicial notice.

The Court: We will recess at this time until 10 tomorrow morning.

10 o'clock a.m. June 11, 1948

ALEXANDER BARCLAY, JR.

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Will you state your name, Doctor?

(Testimony of Alexander Barclay, Jr.)

The Court: I am not sure that the record shows that the plaintiff has rested.

Mr. Young: Perhaps we did not announce that we rested, but the records should so show.

The Court: Very well, now Mr. Casterlin you may continue with your direct examination.

Q. You reside in Coeur d'Alene?

A. Yes, sir.

Q. And are a practicing physician and surgeon?

A. Yes, sir.

Q. And the nature of your practice is general practitioner? A. That's right.

Q. You are licensed to practice in Idaho?

A. Yes, sir.

Q. And have been for how many years? [170]

A. Almost ten years.

Q. (By Mr. Casterlin): Do you question the Doctor's qualifications?

Mr. Young: Not at all, I admit them.

Q. Are you acquainted with Mr. Downum, the plaintiff in this case? A. Yes, sir.

Q. State whether you gave him a physical examination? A. I did.

Q. When? A. The second of June, 1948.

Q. Where? A. My office.

Q. Tell us whether or not your examination involved the shoulder condition and the right hand condition? A. It did.

Q. What were your findings with respect to that?

A. Mr. Downum had suffered from an injury to the Ulnar nerve at the time of the accident; this

(Testimony of Alexander Barclay, Jr.)

nerve was not severed but in all probability it was stretched, that is, it was torn. Damage to the nerve was not complete at any time; that is, at any time according to the history as to the motion in the hand. The only external evidence is a small scar on the right shoulder in this frontal area [171] which could not have been deep enough to cut the nerve as the main nerve passes under the collar bone rather deep. Originally there is a history that he had numbness in the ring finger and little finger with weakness in the muscle in the web of the thumb which is compatable with the present ulnar nerve injury. Since that time sensation in the fingers has returned and the only damage noticed now is when his hand is cold and he still has moderate atrophy in the back of the hand and the muscle in the web, but he thinks this is improving. If this nerve had been cut chances of his ultimate recovery would be very poor unless it has been sutured together. However, in case of ulnar nerve injury to the brachial plexus where the nerve is torn, the majority of cases return to normal so the chances of his getting the use of this hand is pretty good.

Q. Your prognosis is good? A. Yes, sir.

Q. Return to normal will be accomplished in about what length of time?

A. I don't want to be misunderstood on that point. It is not certain that this nerve will return entirely to normal but the chances of its returning to normal are very good. It should come back within the next six months I would judge. [172]

(Testimony of Alexander Barclay, Jr.)

Q. To what degree has Mr. Downum been handicapped by the injury to the ulnar nerve?

A. Some of the fine motions, he has not the ability to do that fine work, the question of using the thumb, in that he has very little use of his hand in that manner.

Q. The injury to this nerve goes to the—strike that—did the injury of this nerve cause any failure to close the hand, to grasp? A. No, sir.

Q. Would the injury to that nerve in any way affect the elevation of the hand?

A. You mean the motion of the elbow?

Q. Yes. A. No, sir.

Q. Or any motion of the shoulder? A. No.

Q. What motion of the fingers would be affected?

A. Adduction and abduction and the apposition of the thumb to the other fingers of the hand.

Q. So that any activity which required the lateral opening of the fingers would be affected?

A. Yes, sir.

Q. I will ask you whether or not you examined him with reference to the flexion of the lower extremities? [173]

A. He has rather a marked limitation of motion in both knees. He cannot fully extend his knee, nor can he flex his knee to right angle.

Q. That condition is a result of what?

A. That condition is a result of having his leg or both legs encased in a cast together with traction he had on the bone for a period of approximately four months. If you take a normal leg and put it

(Testimony of Alexander Barclay, Jr.)

in a cast for that time you would get a stiffness of the knee.

Q. What is your prognosis as to what—what is your opinion as to the degree of motion that he has in the knees now?

A. He lacks about ten degrees of being able to extend his leg fully. He can flex; the normal range of motion in the knee is around 135 degrees which ranges from 180 this way back to about 45 this way.

Q. The 180 degrees is when the leg is straight?

A. Yes, sir.

Q. As you put the heel back toward the buttocks that is the degree you mentioned? A. Yes.

Q. He lacks about ten degrees of straightening his leg?

A. Yes, entirely, his range of motion is from 10 to 35 or about 25 degree motion in the knee and the left is about five degrees better than the right.

Q. He has about 25 degree rear motion?

A. Yes, sir. [174]

Q. The normal would be what? A. 135.

Q. At the conclusion of your examination respecting the leg motion did you form any opinion as to the prognosis? A. Yes, sir.

Q. What is that?

A. I think it will improve as he goes along.

Q. What should he do in order to effect this improvement?

A. He is going to have to use it, walking on it. He is going to have to force himself to bend it more and more to break that scar tissue that formed in

(Testimony of Alexander Barclay, Jr.)

the knee. It is going to be very hard to do but he is going to have to do it to increase the motion.

Q. It is hard from a physical or mental sense?

A. As far as pain goes.

Q. It has to be determined by exercise, the flexing of the leg, and that will improve the condition?

A. Yes, sir.

Q. And it takes determination?

A. Yes, sir.

Q. By exercise and determination do you have an opinion as to what the change would be?

A. It probably will be more in the left leg, because in the right he also fractured the knee-cap. Now, that is entirely a guess. He probably can increase his range of motion in the left knee until he gets 80 per cent [175] of his motion back, in the right knee it would be less, possibly seventy per cent in the right knee.

Q. Did you find any difference in the length of the legs? A. Yes, sir.

Q. What was that difference?

A. The right leg is $\frac{5}{8}$ inch shorter than the left.

Q. Can that condition be corrected?

A. It would not be corrected but it can be compensated for.

Q. You mean by using a heel lift and building up the shoe on that side? A. Yes, sir.

Q. What result would you expect by this compensation?

A. He would overcome the compensatory tilt of

(Testimony of Alexander Barclay, Jr.)

the pelvis; that sclerosis of the spine and this low back ache he notices now.

Q. Would that back ache disappear if this was compensated by a heel lift?

A. In all probability.

Mr. Casterlin: That is all, Doctor.

Cross-Examination

By Mr. Young:

Q. Doctor, it is a fact is it not that regeneration of nerve tissue is not the same as soft tissue or bone tissue? A. That is correct.

Q. When you stated that six months would see some improvement [176] in the nerve injury that my client has in his arm and hand, that is somewhat speculative? A. No, sir.

Q. He has been twelve months with progressive atrophy in the hand; what causes you to fix a term of six months for conditional to complete recovery from that?

A. According to the history given me this hand has improved all along. It is better all the time. He has overcome the sensory loss in these two fingers (indicating).

Q. What part of the nerve supply controls the muscle tone and muscle substance in the hand?

A. The interossie muscle of the hand are supplied by the ulnar nerve.

Q. What part of the ulnar nerve sustains the muscle tone? A. The Motor nerve.

Q. It is possible to have an injury to the sensory nerve and not to the motor part of the nerve.

(Testimony of Alexander Barclay, Jr.)

A. That depends on what part of the nerve you——

Q. Let me put it this way. The sensory and motor nerve—that is, you can have a disturbance of the sensory of the ulnar nerve without disturbance of the motor? A. Yes, sir.

Q. And you can have a disturbance of the motor nerve and not have anything involving the sensory part? A. That is true. [177]

Q. What we have here is a disturbance of the motor part of the nerve? A. Yes, sir.

Q. Assuming that the sensory part is near normal? A. That's right.

Q. You could have a complete severance of the motor nerve and not have a disturbance of the motor nerve? A. That is wholly problematical?

Q. It is possible? A. I think it would be.

Q. There is some involvement of the sensory nerve? A. Very minor.

Q. There is a definite indication of atrophy—definite indication that the motor part of the ulnar nerve is damaged?

A. Yes, but not complete. If it were complete he would not be able to move the muscle.

Q. It is your opinion that six months will show some improvement? A. Yes, sir.

Q. You don't expect complete recovery?

A. It is possible.

Q. That complete recovery is in the realm of speculation. A. Yes, sir.

Q. You do expect some recovery?

A. Yes, sir.

(Testimony of Alexander Barclay, Jr.)

Q. You examined his legs? [178]

A. Yes, sir.

Q. You took an X-ray of his legs?

A. Yes, sir.

Q. He did have two fractures of the femur?

A. Yes, sir.

Q. What type of fracture?

A. Comminuted fracture.

Q. One of the fractures was overlapping?

A. Yes, sir.

Q. Where you have an overlapping that is an occasion of the shortening of the leg?

A. Yes, sir.

Q. That was true here? A. Yes, sir.

Q. The bones are united in this fashion (indicating)? A. Yes, sir.

Q. There is a likelihood that any moderate injury to the leg might refracture that leg?

A. A union such as that might be more easily broken.

Q. A union such as that would not stand the strain a union would in this position (indicating)?

A. It would probably be more easily fractured than the normal bone.

Q. By reason of the overlapped bones they are in the soft tissue, that is, you have the roughened surface lying in [179] soft tissue.

A. Yes, sir.

Q. That makes for muscular weakness?

A. Yes, sir.

Q. When you start to exercise this leg you have

(Testimony of Alexander Barclay, Jr.)

movement of muscles over these roughened areas and with the scarred tissue that has formed you have continued irritation? A. Yes, sir.

Q. That lessens the utility or the functional use of the leg? A. That is right.

Q. He has an involvement of the knee joint?

A. In the right.

Q. There is arthritis now, in that knee?

A. I didn't find it.

Q. Did you find an arthritic change in either knee? A. No, sir.

Q. Did you see the X-ray film of Dr. Grieve giving evidence of the arthritic change?

A. No, sir—if I understood his testimony he defined his arthritic change by crepitation he felt when the knee was moved.

Q. I thought he pointed out on the film?

A. No, he showed evidence of the atrophy of the bone which he says was due to disuse. [180]

Q. Does that amount to arthritic change?

A. No, sir.

Q. You say one leg—one femur that had two bolts? A. Yes, sir.

Q. They show on that film? A. Yes, sir.

Q. There are screws that extend into the soft tissue? A. Yes, sir.

Q. That is a source of irritation?

A. It can be.

Q. To any and all reasonable likelihood it is?

A. Many times I have seen them when the patient never complained and when you try to get the screws out they say "leave them there."

(Testimony of Alexander Barclay, Jr.)

Q. These screws extend about a quarter of an inch beyond the plate? A. Yes, sir.

Q. They extend into the soft tissue?

A. Yes, sir, and evidently it is on the bottom part of the leg where it rests against the chair.

Q. He says he is irritated by it?

A. There was a question in my mind whether it came from the screws or this bony knob on the femur. In all probability it is due more to this bony knob.

Q. That is a part of the fragment of the fracture?

A. Yes, with a lot of increased callus. [181]

Q. It has been suggested that you can open up the site of the fracture and take off the bolts, now, when you take off the bolts you weaken that union?

A. The union is pretty firm now.

Q. As compared with the union on the other side, this (indicating) is in better position?

A. No, I wouldn't say it is in better position. I would say they are equally well healed.

Q. When you open up the leg and take out the bolts, if you remove the bony knob you would increase the scar tissue at the site of the fracture?

A. Yes, sir.

Q. And you damage the muscle sheaths?

A. Not necessarily.

Q. There is a likelihood of it when the scar tissue fills in?

A. It would depend on the approach.

Q. Did you measure his leg? A. Yes, sir.

(Testimony of Alexander Barclay, Jr.)

Q. Did you notice a difference in the measurement of the thigh? A. Yes, sir.

Q. Have you the measurements of the legs with you, Doctor Barclay? A. Yes, sir. [182]

Q. Can you give them to me?

A. The right leg measured $35\frac{3}{8}$ inches, the left one measured 36 inches; that is from the illiac notch to the malleolus.

Q. What is that? A. The ankle.

Q. Did you take the thigh measurements?

A. Yes, sir.

Q. There is a difference, is there?

A. Yes, sir.

Q. And what is that?

A. The right thigh $17\frac{1}{2}$ inches and the left 17; the right calf 14 and the left $13\frac{1}{2}$, so there was an atrophy of the left leg.

Q. That would be caused by non-use?

A. Yes, sir.

Q. Would it also be caused by nerve involvement? A. No, sir.

Q. Did you test him to determine whether he had any neurological signs? A. Yes, sir.

Q. Did you find any? A. No, sir.

Q. He is suffering from muscular weakness in both legs? A. Yes, sir.

Q. In the left more than the right? [183]

A. Yes, sir.

Q. Did you examine his face? A. Yes, sir.

Q. What did that examination disclose?

Mr. Casterlin: Objected to as this is not proper

(Testimony of Alexander Barclay, Jr.)

cross-examination, this was not gone into on examination in chief.

The Court: Objection sustained.

Q. (By Mr. Young): May I make this Doctor my witness—I think, I will not ask that—that is all.

Redirect Examination

By Mr. Casterlin:

Q. Doctor, you say that the sensory loss is in these two fingers (indicating).

A. The little and ring fingers, yes, sir.

Q. When a nerve is torn or stretched it is possible to stretch the sensory portion of the nerve without stretching the motor part? A. No, sir.

Q. So if the nerve is stretched the injury to the motor function is the same as the sensory function?

A. As a general rule.

Q. How could you stretch the sensory portion without stretching the motor?

A. I doubt that it could be done in the ulnar nerve, it [184] could be done in the nerve that governs the sensory fibers only. It is difficult to conceive that it could be done with the ulnar nerve.

Q. In your opinion, Doctor, when you say there will be an improvement in the sensory function, it would necessarily follow that there would be an improvement in the motor function?

A. Yes, sir.

Q. With respect to the screws, and this union of the bone, has nature made any provision for protecting the muscle from extraneous matters of that kind? A. Yes, sir.

(Testimony of Alexander Barclay, Jr.)

Q. Explain that.

A. That was a direct question in regard to this man was it?

Q. Yes.

A. I cannot say that nature has made any provision in his case.

Q. Whenever a foreign substance is imbedded in muscular tissue does nature make any provision for protection against irritation? A. Yes, sir.

Q. What is that?

A. A foreign substance introduced into the muscular tissue is generally walled off by the body to protect it, and it is generally protected in that way. [185]

Q. This walled off protection would take care of any irritation or pain because of the substance?

A. No, it might cause more irritation.

Q. What was the condition you found in Mr. Downum with respect to the screws and the bone union?

A. It is my opinion that the pain and irritation in the back of his leg sitting down is from the callus formation rather than the screws.

Q. You mentioned the proper approach in removing the bolts so far as the resultant scar tissue was concerned. What do you mean, Doctor?

A. That care and forethought must be given in making the incision and care of the tissue you pass through. It would be possible to go in and remove the screws and take out the bolts and practically the only scar tissue would be the line of the

(Testimony of Alexander Barclay, Jr.)

incision. On the other hand, if you went in boldly without foresight and pulled aside whatever you found—muscle and muscle tissue it would be possible to leave lots of scar tissue.

Q. A surgeon has to know his muscles?

A. That's right.

Q. If he does then the resultant scar tissue is minimized? A. Yes, sir.

Q. With respect to the length of the right and the left legs according to the measurements you gave it amounts to $\frac{5}{8}$ inch difference. [186]

A. Yes, sir.

Q. The circumference of the thigh, now, doctor, would there be any equalizing of that in your opinion?

A. If he builds the muscle up there will be.

Q. Suppose there is a one-half inch difference in the size of the thighs, is that unusual in the human body?

A. I would say that it was, yes, sir.

Q. With this man, as time goes on would you expect this measurement to equalize?

A. If he uses the left equally with the right he will develop the muscle.

Q. How about the circumference at the calf?

A. The same goes for that.

Q. This muscular weakness in the leg, is that what you had in mind when you said by exercise there would be a recovery from that weakness?

A. Yes, sir.

Mr. Casterlin: That is all.

(Testimony of Alexander Barclay, Jr.)

Recross-Examination

By Mr. Young:

Q. If the pain is such that he cannot exercise it to a degree sufficient to build up the muscle, then, of course, it would remain stiff or become progressively worse? A. That is correct.

Q. Judging from his picture, his general physical picture [187] here, the fact that one leg is $\frac{5}{8}$ inch shorter than the other and the fact that there is an overlapping of the femur bone, that is the reason for the difference—— A. ——yes, sir.

Q. And the roughened surface of the bones by reason of the overlapping, now, Doctor, is it not your opinion that because of these conditions he will find it extremely difficult to use that leg sufficient to build up the muscle tone?

A. He will build up a lot of muscle tone.

Q. He can improve it? A. Yes, sir.

Q. You don't expect them to become normal?

A. No, sir.

Q. You don't expect the right to be comparable with the left? A. Yes, I do.

Q. You say you expect the right leg to be comparable with the left leg?

A. The left leg is the atrophied leg now. I expect it to reach the right so far as muscular tone is concerned.

Mr. Young: That is all.

Redirect Examination

By Mr. Casterlin:

Q. The right is the shorter leg now?

(Testimony of Alexander Barclay, Jr.)

A. Yes, sir. [188]

Mr. Casterlin: That is all.

Mr. Young: That is all, yes.

Mr. Casterlin: The defendant rests.

The Court: Do you have any rebuttal.

Mr. Young: I will call Mr. Downum in rebuttal.

RAYMOND DOWNUM

Being recalled in rebuttal, having been heretofore duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. Before you were hurt how tall were you?

A. Five foot eleven inches.

Q. How tall are you now?

A. Five foot nine inches.

Q. Now, Mr. Downum, just before this collision you had sold your farm? A. That's right.

Q. What were your plans, what did you intend to do?

A. Our plans were to buy another farm and continue farming.

Q. How long had it been—how long was it after you sold your farm that you were injured?

A. It was about the first of March I sold the farm and I was injured the 14th of May.

Q. You were looking for another place?

A. We intended to as soon as school was out so that we could [189] leave Bonners Ferry.

Q. Your entire training has been that of farmer?

A. That's right.

Q. During the time you were in the hospital

(Testimony of Raymond Downum.)

what change was necessary in the mode of your family living?

A. She had to come to Spokane, at least she did come to Spokane and was at the hospital practically every day until in December.

Q. You didn't keep track of your expenses?

A. No, we didn't.

Mr. Young: That is all.

Mr. Casterlin: No questions.

MRS. EDNA DOWNUM

Called in rebuttal by the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. You are the wife of Raymond Downum and one of the plaintiffs in this case?

A. Yes, sir.

Q. Do you know how tall your husband was before this collision? A. Five foot eleven.

Q. Do you know how tall he is now?

A. Five foot nine.

Q. What was the business life of you folks before March? A. Farming. [190]

Q. What were your plans just before this collision occurred?

A. Going back to farming, we didn't know just where; we were going to buy a farm.

Q. What, if any, general expenses were you put to by reason of this collision that you would not otherwise have been put to?

(Testimony of Mrs. Edna Downum.)

Mr. Casterlin: Objected to as being too general.

The Court: Sustained.

Q. What were you required to do that cost you money? A. I went to Spokane.

Q. Did you maintain a home at Spokane?

A. No, sir, I moved to Spokane with the children.

Q. Has your husband been required to make some follow-up trips on account of this injury?

A. Yes, to go to Spokane once a month for a check-up.

Mr. Young: That is all.

Cross-Examination

By Mr. Casterlin:

Q. When were you married? A. 1934.

Mr. Casterlin: That is all.

Mr. Young: That is all. [191]

The Court: Do you have anything further, Mr. Young?

Mr. Young: Nothing, Your Honor, the plaintiff rests.

Mr. Casterlin: Government rests. [192]

State of Idaho,

County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the District Court in and for the District of Idaho, and I further certify that I am the person who took, in shorthand, the testimony and proceedings in the above-entitled case, and that I thereafter transcribed the same into

longhand, and I further certify that the foregoing transcript consisting of pages numbered 3 to 152 is a true and correct transcript of the testimony given and the proceedings had in and about the trial of the said cause.

In witness whereof I have hereunto set my hand this 5th day of January, 1949.

/s/ G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed Jan. 7, 1949. [193]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain amended Judgment made and entered herein on November 1, 1948.

JOHN A. CARVER,

United States Attorney for
the District of Idaho,

PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

[Endorsed]: Filed Dec. 13, 1948. [194]

[Title of District Court and Cause.]

STATEMENT OF POINTS UNDER
RULE 19

Comes Now the above-named appellant and files its statement of points on which it will rely on the appeal of this matter:

I.

That the Court erred in the award made for pain and suffering in that it is excessive under all of the facts presented in this matter.

II.

That the Court erred in awarding the amount it did for loss of earnings in that the Court was without any basis of fact for such finding.

III.

That the Court erred in using an annuity table alone as a basis for competing the award to compensate for loss of earnings.

IV.

That the Court erred in making an amended finding and award for pain and suffering on the hearing for the Motion to Amend Findings of Fact and Conclusions of Law. [195]

V.

That the Court erred in amending the Findings of Fact and Conclusions of Law to include the award for pain and suffering for the reason that there was nothing before the Court at that time upon which to base such award.

VI.

That the Court erred in making one finding of damages sustained for pain and suffering, personal

injuries, loss of earnings, and permanent physical disability.

VII.

That the Court erred in making a finding for loss of wages in the absence of proof with respect to the damages, impairment of earning capacity and the present worth of each of the future installments of lost earnings suffered by plaintiff.

/s/ JOHN A. CARVER,

United States Attorney for
the District of Idaho,

/s/ PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

[Endorsed]: Filed Jan. 7, 1949. [196]

[Title of District Court and Cause.]

PRAECIPE

To Ed. M. Bryan, Clerk of the U. S. District Court:

Please prepare a transcript of the following papers in the above-entitled action for transmission to the Circuit Court of Appeals for the Ninth Circuit:

1. Complaint of plaintiff filed February 24, 1948.
2. Interrogatories to adverse party filed March 26, 1948.
3. Answer filed by defendant April 20, 1948.
4. Answer to Interrogatories propounded by defendant, filed April 21, 1948.
5. Findings of Fact and Conclusions of Law filed June 17, 1948.

6. Judgment filed June 22, 1948.
7. Notice of Appeal filed August 19, 1948.
8. Motion for Order Amending and Correcting Findings of Fact, Conclusions of Law and Judgment, filed by defendant September 29, 1948.
9. Motion to strike, or in the alternative to Amend Findings of Fact.
10. Minutes of the Clerk of the United States District Court for the District of Idaho, dated October 18, 1948, relating to hearing on the matters number 8 and 9.
11. Amended Findings of Fact and Conclusions of Law, filed Nov. 1, 1948.
12. Judgment, filed [197]
13. Reporter's transcript of evidence and proceedings and all exhibits introduced by plaintiff and defendant.
14. Statement of points on which appellant intends to rely.
15. This praecipe.
16. The designation of contents of record on appeal and proof of service.
17. All clerk's minutes.
18. Order, if any, extending time for filing record in appellate court.

/s/ JOHN A. CARVER,
United States Attorney for
the District of Idaho,

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for
the District of Idaho.

[Endorsed]: Filed Jan. 7, 1949. [198]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint of plaintiff filed February 24, 1948.
2. Interrogatories to adverse party filed March 26, 1948.
3. Answer filed by defendant April 20, 1948.
4. Answer to Interrogatories propounded by defendant, filed April 21, 1948.
5. Findings of Fact and Conclusions of Law filed June 17, 1948.
6. Judgment filed June 22, 1948.
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10. Minutes of the Clerk of the United States District Court for the District of Idaho, dated October 18, 1948, relating to hearing on the matters numbered 8 and 9.
11. Amended Findings of Fact and Conclusions of Law, filed Nov. 1, 1948.
12. Judgment, filed

13. Reporter's transcript of evidence and proceedings and all exhibits introduced by plaintiff and defendant.

14. Statement of points on which appellant intends to rely.

15. This designation of contents of record on appeal and proof of service. [199]

16. All clerk's minutes.

17. Orders, if any, extending time for filing record in appellate court.

In preparing the above record, you will please omit the title on all pleadings filed in the cause except on the Complaint, and insert in lieu thereof "title of the court and cause" followed by the name of the pleading or instrument and the date of filing. You will also omit the verifications and note in lieu thereof "duly verified" if the same be verified. You will also omit the acknowledgment of service on all pleadings and other documents.

/s/ JOHN A. CARVER,

United States Attorney for
the District of Idaho,

/s/ PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

[Endorsed]: Filed Jan. 7, 1949. [200]

[Title of District Court and Cause.]

MOTION TO EXTEND TIME FOR FILING
RECORD AND DOCKETING APPEAL

The United States of America, the Appellant,
shows to the Court as follows:

I.

Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit was filed herein on December 13, 1948.

II.

The Notice of Appeal was filed for the purpose of protecting the interests of the United States until the Attorney General could determine if the appeal is to be perfected or dismissed.

III.

The Attorney General has not advised this office of its decision and the time for docketing in the Circuit Court will expire on January 22, 1949.

Wherefore, appellant moves the Court for an order extending the time within which the record on appeal may be filed and appeal docketed in the Circuit Court of Appeals until February 21, 1949.

JOHN A. CARVER,

United States Attorney for
the District of Idaho,

PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

ORDER

Upon motion of the appellant, good cause appearing therefor,

It Is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the United [201] States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to the 21st day of February, 1949.

Dated January 7, 1949.

CHASE A. CLARK,
District Judge.

[Endorsed]: Filed Jan. 11, 1949. [202]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 202, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above-entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of

said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$22.50.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, this 18th day of January, 1949.

(Seal) /s/ ED M. BRYAN,
Clerk.

[Endorsed]: No. 12162. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Raymond Downum and Edna Downum, husband and wife, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed January 25, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12162

UNITED STATES OF AMERICA,

Appellant,

vs.

RAYMOND DOWNUM and EDNA DOWNUM,
husband and wife,

Appellee.

ADOPTION OF POINTS AND DESIGNATION
OF RECORD FOR PRINTING

Comes Now the United States of America, appellant, and in compliance with Rule 19, Subdivision 6, hereby adopts as its points the Statement of Points filed in the District Court on January 7, 1949, and which appear in the transcript of record, and appellant hereby designates the entire transcript of record for printing as provided in said rule.

/s/ JOHN A. CARVER,

United States Attorney for
the District of Idaho,

/s/ PAUL S. BOYD,

Assistant U. S. Attorney for
the District of Idaho.

[Endorsed]: Filed February 9, 1949. Paul P. O'Brien, Clerk.



In the United States
Circuit Court of Appeals
Ninth Circuit

RAYMOND DOWNUM and EDNA DOWNUM,
husband and wife, Appellees.

Upon Appeal from the District Court of the United States
for the District of Idaho
Northern Division

W. J. NIXON, Attorney at Law,
Bonners Ferry, Idaho, and
GEORGE W. YOUNG, Attorney at Law,
Spokane, Washington
Attorneys for Appellees

JOHN A. CARVER, United States Attorney,
for the District of Idaho
PAUL S. BOYD, Assistant U. S. Attorney
for the District of Idaho
SHERMAN F. FUREY, JR., Assistant U. S. Attorney
for the District of Idaho
Attorneys for Appellant

Filed , 1949
..... , Clerk



No. 12,162

In the United States
Circuit Court of Appeals
Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

VS.

RAYMOND DOWNUM and EDNA DOWNUM,
husband and wife, Appellees.

BRIEF FOR APPELLANT
UNITED STATES OF AMERICA

Upon Appeal from the District Court of the United States
for the District of Idaho
Northern Division



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I.

Statement of the Case

This appeal is from a judgment of the United States District Court, Northern Division, against the United States and in favor of Raymond Downum and Edna Downum, in the amount of \$64,973.88. The action was brought under the provisions of the Federal Tort Claims Act. (28 USCA 931, et seq).

Statement of Facts and Record

Plaintiff-Appellees allege that on or about May 14, 1947, Raymond Downum, age 35, was driving a Model A truck, which he owned, a few miles west of Bonners Ferry, Idaho, and was proceeding in an easterly direction, in the early afternoon of that day. Corporal Clyde W. Smith, a member of the United States Army, and on active duty and acting under orders that day, was driving a truck owned by the United States, and was proceeding in a westerly direction approaching the vehicle of Raymond Downum. Plaintiffs further allege that Corporal Smith collided, head on, on his left hand side of the road with the truck driven by Raymond Downum, this collision causing severe injury to Raymond Downum, as a result of which Raymond Downum suffered severe injury, all of which is set out in the Complaint.

The Government denied the allegations of Raymond Downum and the matter went to trial before the Court on the question of whether or not the Government's employee was negligent and the amount of damages suffered by Mr. Downum. Upon the conclusion of the trial, the Court found for appellees in the total amount of \$64,973.88.

Thereafter, on June 22, 1948, Findings of Fact, Conclusions of Law (Tr. 19), and Judgment (Tr. 23) were entered. Notice of Appeal (Tr. 25) was filed August 19, 1948, and the Court extended the time of filing the record and docketing the Appeal from September 22, 1948, until November 23, 1948. (Tr. 26).

Thereafter, on September 29, 1948, the appellant filed a Motion for Order Amending and Correcting Findings of Fact and Conclusions of Law, (Tr. 27) and in response and in reply thereto, the appellees filed a Motion to Strike, or in the Alternative to Amend Findings of Fact. (Tr. 28).

Thereafter, on October 28, 1948, the Motion to Amend the Order and Correcting Findings of Fact came on to be heard. The Court sustained the position of the Government and denied the Motion of the plaintiff to correct the Findings in regard to the life expectancy of Raymond Downum. (Tr. 29). The Court then instructed the plaintiff to re-draw the Findings of Fact and to include a finding for pain

and suffering. Appellant objected, and took exception to the Court's granting permission to counsel for appellee to include the findings for pain and suffering. (Tr. 29).

Thereafter, on November 1, 1948, counsel for appellee filed Amended Findings of Fact and Conclusions of Law (Tr. 30). No amended judgment was filed in this case. The Government filed Notice of Appeal on December 13, 1948, (Tr. 164), and is prosecuting this appeal from the complete record made in the lower court.

II.

Specifications of Errors

Appellant sets out herein, the errors which it claimed in its statement of points under Rule 19, and will set them out in the same order in which they are carried in the transcript of record. (Tr. 165).

1. That the Court erred in the award made for pain and suffering in that it is excessive under all of the facts presented in this matter.
2. The Court erred in awarding the amount it did for loss of earnings in that the Court was without any basis of fact for such finding.
3. That the Court erred in using an annuity table alone as a basis for computing the award to compensate for loss of earnings.
4. That the Court erred in making an amend-

ed finding and award for pain and suffering on the hearing for the Motion to Amend Findings of Fact and Conclusions of Law.

5. That the Court erred in amending the Findings of Fact and Conclusions of Law to include the award for pain and suffering for the reason that there was nothing before the Court at that time upon which to base such award.

6. That the Court erred in making one finding of damages sustained for pain and suffering, personal injuries, loss of earnings, and permanent physical disability.

7. That the Court erred in making a finding for loss of wages in the absence of proof with respect to the damages, impairment of earning capacity and the present worth of each of the future installments of lost earnings suffered by the plaintiff.

III.

Argument

For the purpose of consolidating this brief and without waiving any of the points which are listed in the Specifications of Errors, appellant consolidated the specifications, and directs its argument toward certain phases of the record. It appears to appellant that there are several general points which incorporate all of the specifications of error and in

presenting the matter to the Court, appellant feels it can be done this way rather than going into each individual specification of error, and perhaps duplicating the arguments and citations of authorities.

1.

Appellant charges that the Court erred in making an award for loss of future earnings, which future earnings were based on the life expectancy of 31 years, unsupported by any proof other than "judicial notice" of a life expectancy table. The transcript of record discloses nothing regarding the appellee's physical condition prior to the accident or the use of life expectancy tables in determining the appellee's probable life expectancy other than the following excerpt:

"MR. YOUNG: 'I think the Court takes judicial knowledge or notice of the mortality table. It is alleged that he had a certain expectancy of life.' "

"MR. CASTERLIN: 'It is understood and agreed that the Court takes judicial notice.' "
(Tr. 145).

The appellant has examined carefully the transcript in this cause and fails to find any evidence which would support the lower Court's Findings to the effect that the plaintiff had, at the time of trial, a life expectancy of 31 years. (Findings No. 6, Tr.

20). The life expectancy of Mr. Downum cannot be determined by reference to a mortality table, alone. The mortality tables serve no purpose other than to give the average duration of the lives of great numbers of persons. It does not establish the longevity of any particular person. Let us refer to what the Court said in *Vicksburg and Meridian Railroad Company vs. Putnam*. (118 U. S. 545).

“Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. But what the jury in this case had to consider was the *probable duration of the plaintiff's life and the impairment of the capacity to earn his livelihood.*”

It is obvious from a study of that case that the Court used a mortality table together with other competent testimony, as to the condition of his health prior to the accident. A careful examination of the transcript of evidence in this trial reveals that there was no evidence introduced upon which the Court could base a finding as to the life expectancy of Mr. Downum. There was no expert testimony or testimony of any kind as to the state or condition of his health, or as to the number of years that he could reasonably expect to live, therefore, there was no reasonable basis upon which the Court could arrive at a figure to represent the number of years Mr. Downum would live.

Quoting from McCormick on Damages, page 302,

there is found the following statement, which is indicative of the general rule:

“In any event, if the life expectancy, as disclosed by a mortality table, is admitted, the jury should be instructed that this is not conclusive, but is merely to be considered along with all the other evidence as to plaintiff’s age, health, habits, and occupation, in determining the probable length of life.”

And this Court has so held in *Estabrook v. Butte, Anaconda & Pacific Ry. Co.*, 163 F. 2d 781.

Therefore, appellant contends that there is no evidence to support an award of \$64,973.88, when it is based on the record before this court. Let us note, closely, the language of the Court’s Findings, first taken from Finding No. 6, first paragraph. (Tr. 32).

“That immediately prior to the collision of said vehicles, plaintiff Raymond Downum was a strong, healthy, able bodied man, aged 35 years; that immediately after said collision, and as a result therefrom, said plaintiff became lame, sick, sore, and disordered, and shall remain so for the remainder of his natural life, which, according to the American Mortality Table, is 31 years.”

The Court was in error in making this finding of the life expectancy of Mr. Downum. Mr. Downum

could have had an incurable disease, which might have shortened his life considerably. There is no proof before the Court what his health condition was at the time of the accident and prior thereto. There was no evidentiary basis for the Court's finding relative to the longevity of Mr. Downum. This record is bare of any supporting evidence necessary to permit the proper use of the mortality table, and the Judgment is not supported by the evidence in making this award.

2.

Appellant has stated as a specification of error, among others, that the Court erred in permitting counsel for appellee to amend the Findings of Fact and Conclusions of Law on the hearing of October 18, 1948, at the time we were moving the Court for its Order amending and correcting the Findings. This motion was made for the reason that we appellant felt the Court had made a mathematical error in computing the amount of loss of future earnings. The Findings of Fact, at that time, were as follows:

“that the plaintiff will in the future sustain a general loss of earnings as a proximate result of said injuries in an amount found by the Court to be \$58,500.” (Finding No. 10. Tr. 22).

It is obvious that a man who is earning only \$3,000 a year, and only 60% incapacitated, would not

have a loss of future earnings of \$58,500, and this was called to the Court's attention and the Court agreed. An injured man is entitled only to recover a sum which takes into account his probable expectation of earnings, and to receive that sum discounted for present payment.

Appellant admits that damages are recoverable for impairment of earning capacity as a result of injuries found to be permanent. However, they must be capable of ascertainment with reasonable certainty. (15 Amer. Jur. Section 89, page 499).

"Generally a recovery may also be had for loss of future earnings, provided they are shown with reasonable certainty and are not merely speculative in character."

McClain v. Lewiston Interstate Fair and Racing Assn., Ltd., et al, 17 Ida. 63; 104 Pac. 1015.

Roy v. OSLRR, 55 Ida. 404-418; 114 P.2d 258.

Damages recovered for loss of future earnings or earning capacity must be discounted for present payment, and only the present value thereof included in the award. (15 Amer. Jur., Sec. 95, page 505; *Chicago and Northwestern Railroad Co. v. Candler*, C.C.A. 8, 283 Fed. 881; 28 A.L.R. 235). The damages here awarded greatly exceed the cost of an annuity, less the allowance for diminution of wages

caused by advancing years. The burden is upon the plaintiff to produce evidence with respect to his damages, impairment of earning capacity, and present worth of each installment of lost earnings suffered by him. The only matter before the Court was the motion to compute correctly the award as to the loss of future earnings.

Appellant here offers the sample computation to this Court that was offered the lower court, to substantiate our position that the award was too high. Incidentally, as the matter stood in the original Findings, there was no award for pain and suffering, as appellant reads the record, and the full \$58,500 was for loss of earnings.

Plaintiff's age was 35 years, taking the Court's finding on its face, and had a life expectancy of 31 years; that he was incapacitated to a degree of 60%, and was earning at least \$3,000 a year. He has an earning capacity on his own of 40%, or \$1200, for the balance of his life. His earnings, then have, theoretically, been reduced by \$1800. We call to the attention of the Court, that there will be an inevitable fall in his earning power, which will grow with advancing years. (Roy v. OSLRR, p. 419, *supra*); (McCormick on Damages, page 306; Krause v. Chicago & Northwestern Railroad Co., 102 Wisc. 196; 78 N.W. 446). However, for the purpose of this argument, let us give Mr. Down-

um the benefit of the presumption that he would earn the full \$3,000.00 to the day of his death. In determining the cost of an annuity, we turned to Vol. III, p. 386 of the new Idaho Code. There appears a table under the heading: "Annuity Valuation Tables," and gives the present value of \$1.00 due at the end of each year during the life of a person of specified age. This is based on Actuaries' Combined Experience Table of Mortality. The present discounted value of \$1.00, returning interest at the rate of 6%, due at the end of each year, is \$12.861 for 31 years. The loss to the appellee is \$1800, and therefore, we multiply that sum by 12.861, and this results in \$23,149.80.

This may be used as a guide in determining the loss of earnings of a man making \$3,000 a year who has been 60% disabled and who has a life expectancy of 31 years, the amount being presently discounted. Thus, we find that the Court should have awarded the sum of, approximately, \$23,149.80, plus the \$3,000.00 for the one year of total disability, or \$26,149.80 for the loss of earnings. Appellant concedes that this is not a fixed rule, but is simply a medium or standard by which the Court may measure or strike an average in determining the loss of future earnings.

If the Court should adopt the figure of approximately \$23,149.80 as the approximate loss of future

earnings of Mr. Downum, the balance of the \$58,500 or \$35,350.20 is greatly excessive. The remaining sum of \$6,473.88, being the balance of the \$64,973.-88, is accounted for by reason of hospital bills in the amount of \$3,473.88 and \$3,000 loss of wages for one year. Mr. Downum cannot realize a profit from his accident for loss of future earnings, but an award, if any is made, is to recompense him or make him well. That is to say, to repay him for the loss of future earnings, theoretically, if it could be computed so accurately, it would mean that it would give him the exact amount he would earn during his lifetime.

“If they made this allowance upon the theory that he was entitled to a sum which, properly invested, would yield him an amount annually equal to his past or expectant wages during his life, leaving the principal undiminished for his estate at his death, and without considering the fact that his earning capacity, while lessened, was not wholly destroyed, then, according to all the authorities they erred.”

Roy v. Oregon Short Line Ry. Co., 55 Ida. 404, at 418; 42 Pac. (2d) 476.

Appellant wants to point out that this is the record on the original Findings of Fact. Let us examine the Amended Findings of Fact. Finding No. 6 (Tr. 32 and 33) has combined several findings therein, and it appears to us that the Court attempted to make the

finding on loss of future earnings, and pain and suffering, although the last paragraph of Finding No. 6 of the Amended Findings (Tr. 33) specifies:

“that plaintiffs have sustained the damage for pain, suffering, personal injuries, and permanent physical disability, including a special damage hereinabove found, in the sum of \$64,-973.88.”

Assuming, for the sake of the argument, that the Court had the authority to amend the Findings of Fact to include pain and suffering, it must be determined, if possible, how much was awarded Mr. Downum as damages for pain and suffering over loss of future earnings. Eliminating \$23,149.80 from \$58,500 as an approximate loss of earnings, the remaining sum, \$35,350.20, must be for pain and suffering. Appellant contends that this sum is excessive under the evidence produced in this cause.

It must be borne in mind that Mr. Downum has made a 40% recovery, and is capable of earning approximately \$1200 a year by his own efforts. There are many jobs and types of work which a man with his percentage of disability can reasonably fill.

It is difficult to lay down an exact rule as to what constitutes an excessive award in cases of this type. It is appreciated that courts are not bound by any strict mathematical formula in arriving at damages of this type, because they are, by their very nature,

speculative. However, courts are bound within well defined limits of reason and discretion in this matter, as is specifically pointed out in *McAlinden v. St. Maries Hospital Assn.*, 28 Idaho 657, on page 681, which reads as follows:

“It is clear that a recovery should not be allowed to the extent of a vindictive or punitive judgment. If the master has been guilty of wanton or criminal negligence, it is the clear and unmistakable duty of the state to deal with him through the criminal laws, and to allow the servant to recover to such an extent only as will leave him as nearly as possible in as good a position as he was before the infliction of the injury.”

Incidentally, in this case, the Idaho Supreme Court reduced the trial court's judgment from \$12,000.00 to \$8,640.00.

In support of our opinion that the award is excessive, appellant cites a few of the following cases which may be of some assistance in an attempt to fix the award in this case:

Faris vs. Burroughs Adding Machine Co., 48 Idaho 310. An 18 year old boy suffered severe brain injuries. Recovered \$25,100.

Hayhurst vs. Boyd Hospital, 43 Idaho 661. An able bodied farm hand, completely disabled by reason of improper hospital care. Recovered \$15,250.

Kinzell vs. Chicago etc., Ry. Co., 33 Idaho 1. A 29 year old plaintiff with life expectancy of 35 years, seriously disabled. Recovered \$25,000. (See 31 Idaho 365).

Osier vs. Consumers Co., 42 Idaho 789. A 56 year old lady lost use of right arm. Recovered \$8,000.

Keim vs. Gilmore & Pitts Ry., 23 Idaho 511. A 76 year old man permanently injured. Recovered \$9,000.

Crumback vs. Murdock, 168 P. (2d) 25. A 26 year old man, laborer, truck driver, with 38 year life expectancy. Permanently injured. Recovered \$25,000.

Isle vs. Kaw Transp. Co., (Kans. 1944) 152 P. (2d) 827. A 48 year old man, injuries resulting in permanent shortening of leg. Recovered \$4,000. Recovery reduced from \$6,000 to \$4,000.

Appellant respectfully calls to the attention of the Court those cases listed in *Roy v. OSLRR*, *supra*, on this point.

In conclusion, on this point, appellenat thinks that the total award of \$58,500 is greatly excessive under all the facts and circumstances. It is excessive under the finding on the original Findings of Fact, where there was no award for pain and suffering, and believes the award is excessive if this court

should find the trial court had the authority to amend the findings.

III.

Appellants final argument is that the Court was without authority to change the basis of the award, and in support of its position herein states that the Court erred in permitting the amendment to the findings of fact. It believes that the Court is governed by Rule 52 of the Rules of Civil Procedure, which provides as follows:

- (a) "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions of the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it

will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary or decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41 (b)."

- (b) "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

As appellant has stated repeatedly, there was nothing before the Court but a motion to correct the original findings, and neither party, within 10 days of the entry of the judgment moved the Court for an order amending or making additional findings in order to avail the moving party of the benefit of Rule 52.

The appellant had come in under the provisions of Rule 60, in order to correct a mathematical or cleri-

cal error in the computation of the award, and which the Court, by its own motion would have had the authority to correct. The action of the Court in making new findings has basically altered the award. As the award now stands, it is impossible to tell whether \$58,500 was awarded for pain and suffering, or for loss of earnings, or for any other reason; or if any portion of it, or what proportion is for any specific loss of appellee.

Rule 52 provides that special findings shall be made. We construe this to mean that the Court originally should have found specially, or for each item of the damages, and that it should not have been a lump sum award in this case. We believe our position is sustained by the case of *Interstate Circuit Inc. et al vs. United States*, 304 U.S. 55.

Conclusion

In this appeal, the appellant has taken the position that the Court erred in the use of the mortality table to determine the life expectancy of the appellee, Raymond Downum, without other competent testimony as evidence; that the Court erred in computing the amount of the award for loss of earnings; that the amount awarded was excessive, either considering it as loss of future earnings award, or as loss of future earnings and pain and suffering; and lastly, permitting the counsel for the appellee to change the basis of the award by making additional findings for pain

and suffering, at a time when the matter was not before the Court.

It is appellants belief that the record will sustain our appeal that the matter be reversed, and the cause be remanded to the lower court for further action.

Respectfully submitted,

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District of Idaho.

PAUL S. BOYD

Assistant U. S. Attorney for the
District of Idaho.

SHERMAN F. FUREY, JR.,

Assistant U. S. Attorney for the
District of Idaho.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

RAYMOND DOWNUM and EDNA

DOWNUM, husband and wife,

Appellees.

No. 12,162

On Appeal From the District Court of the United
States for the District of Idaho, Northern Division

Hon. Chase A. Clark, Judge

BRIEF OF APPELLEES

W. J. NIXON,

Bonnors Ferry, Idaho.

GEO. W. YOUNG,

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Attorneys for Appellees.

FILED

MAY 23 1949



IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	}	No. 12,162
<i>Appellant,</i>		
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II

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OPINION BELOW

The trial court rendered an oral decision not reported in the transcript other than in the clerk's minutes (Tr. 18).

JURISDICTION

Jurisdiction of this action is conferred upon the Court by the terms of the Federal Tort Claims Act, 28 U.S.C.A. 931 et seq.

APPELLEES' STATEMENT OF THE CASE

We believe that appellant's statement of the case is insufficient and therefore, inasmuch as this case is essentially one of fact, choose to make additional statement.

This action was commenced and maintained under the Federal Tort Claims Act. The plaintiffs by their complaint alleged in substance that on or about the 14th day of May, 1947, plaintiff, Raymond Downum was driving a truck over and along a highway approaching Bonners Ferry, Idaho; that one Corporal Clyde W. Smith was driving a truck belonging to defendant during the course of his employment, and under the direction of defendant, approaching the vehicle driven by plaintiff; that as a result of the negligence of Corporal Smith, a collision occurred which occasioned the injuries and damages suffered by plaintiff.

FACTS DISCLOSED BY EVIDENCE

On the 14th day of May, 1947, appellee, Raymond Downum, was in perfect health (Tr. 77). He was aged 35 years, a husband and father of three children, whose vocation was limited to that of farmer and laborer (Tr. 68). While driving a Model A Ford truck over a highway in northern Idaho, approaching the village of Bonners Ferry, he came in collision with a 1½ ton dump truck driven by one Clyde W. Smith under the direction of the defendant. The negligence of Corporal Smith is not questioned.

As a result of the negligence of Corporal Smith, appellee sustained horrible and disabling injuries to his person. His skull was fractured; his face and nose smashed to a pulp (Tr. 48, 83, 127). His chest was burned (Tr. 82). He sustained a cranial nerve injury which produced permanent double vision (Tr. 75, 127, 133). The brachial plexus of his right shoulder was injured resulting in a diminishment of nerve supply to his right arm and hand (Tr. 117). His hand became weakened and the muscles thereof atrophied (Tr. 103). The shafts of both femurs were shattered (Tr. 77, 92, 96) and the right knee cap was fractured (Tr. 92). The tear duct of one eye was destroyed (Tr. 129).

He was thrown immediately into shock. When first discovered, he was in grave danger of death (Tr. 89).

He suffered excruciatingly from pain (Tr. 49, 72, 75). He was hospitalized from the date of the accident, May 14, 1947, until December 22, 1947 (Tr. 72, 73).

His body was encased in casts (Tr. 91). The shaft of one thigh is held together with two bolts and nine screws which extend into the soft tissue and cause him pain upon pressure (Tr. 80, 99).

He was totally disabled for all purposes for a period of one year (Tr. 125). At the time of trial, to-wit: June 10, 1948, he was more than 80% disabled (Tr. 125). His face was disfigured by permanent scars and his nose grossly deviated from mid-line (Tr. 128, 129). He walked with difficulty assisted by the use of a cane (Tr. 143). He cannot kneel nor normally bend his knees (Tr. 101, 105). He will be disabled for all future purposes to the extent of 75% of total (Tr. 109). He was 5' 11" in height prior to his injury, and 5' 9" following his injury (Tr. 162).

At the time of his injury, and for some years before, he was capable and did earn substantial annual income, the evidence of such being as follows:

Income for the year 1942	\$3,039.22
Income for the year 1943	3,696.73
Income for the year 1944	4,104.12
Income for the year 1945	4,459.51
Income for the year 1946	5,007.50 (Tr. 80, 81)

In addition, he sold a ranch in 1947 and made a capital gain of \$6,382.19 (Tr. 80, 81).

The Honorable Chase Clark, after seeing the plaintiff and hearing the testimony, was of opinion that plaintiff had suffered damages generally in the sum of \$58,500.00 and made an award to him in that amount, plus the special damages proved, or a total award of \$64,973.88 (Tr. 18, 23, 24).

SUMMARY OF ARGUMENT

The judgment and findings of the trial court should be sustained because they are supported by substantial evidence.

ARGUMENT

The trial judge had before him the plaintiff. He was in a position to see the wretched physical condition of the plaintiff. His personal view accompanied by x-ray evidence, supported by testimony of plaintiffs' physicians, which testimony was not seriously disputed in any major particular, placed him in a better position to evaluate the damage sustained by the plaintiff than would this honorable court.

“It is a well established principle that the trial court's findings of fact upon conflicting evidence will be binding on appeal and will not be disturbed by the appellate court where they are reasonably supported or sustained by some substantial, credible and competent evidence; and where no error prejudicial to the appellant oc-

curred in the ruling on the admission of evidence.”
 3 *Am. Jur.* (Appeal & Error) Sec. 901, p. 469-70

Shopleigh v. Mier, 299 U.S. 468, 81 L. Ed. 355,
 57 S. Ct. 261. 113 A.L.R. 253;

LaGrada v. U.S. (CCA 8th), 77 F (2d) 673,
 103 A.L.R. 527, writ of certiorari denied in
 296 U.S. 629, 80 L. Ed. 477, 56 S. Ct. 152;

Consolidated Flour Mills v. Ph. Orth. Co.,
 (CCA 7th) 114 F (2d) 898, 132 A.L.R. 697.

There is no set rule or formula for the admeasurement of damages to be allowed for personal injuries. *Missouri Pacific Transp. Co. v. Simon*, 135 S.W. (2d) 336.

An award of \$100,000.00 was sustained by the California Supreme Court where the plaintiff suffered multiple injuries. *McDonald v. Standard Gas Engine Co.*, 47 P. (2d) 777, 8 Cal. App. (2d) 464.

ARGUMENT IN ANSWER TO APPELLANT

Under the heading Argument, appellant's brief pp. 7-11, appellant charges the trial court with error in using a mortality table in arriving at the life expectancy of appellee, stating:

“The transcript of record discloses nothing regarding appellee's physical condition prior to the accident * * * .”

and then argues that because of the claimed deficiency of evidence, it was improper for the trial court to use a mortality table in arriving at the life expectancy

of appellee.

This argument is specious. The appellant apparently overrlooked testimony concerning the health picture of appellee before his injury:

Q. Before this injury, what was your general health, what kind of shape were you in?

A. Perfect.

Q. In good condition?

A. That's right.

Q. Working every day, were you?

A. Yes sir. (Tr. 77)

In addition to the foregoing, there is testimony that appellee was a farmer and a worker out of doors. He must have been in excellent condition because he survived injuries which would have killed a less robust person.

Appellant's argument, sub-division 2, pp. 11-19, consists of an attack on the trial court's order amending the findings in this case. *The record shows that appellant moved to amend the Findings of Fact (Tr. 27)* and that as a counter motion, appellee moved to strike appellant's motion for an order amending and correcting Findings of Fact, or in the alternative to amend Findings of Fact 6 to the effect that the plaintiff (appellee here) had a life expectancy of 39

years according to a table contained in the World Almanac and Book of Facts for 1948, p. 449 (Tr. 28). The trial court denied appellee's motion but did amend its findings on *motion of appellant*, the ordering part as disclosed by the Court's minutes stating: "Counsel for plaintiff was instructed to redraw finding in accordance with the court's oral opinion" (Tr. 29). The court's oral opinion is found in the minutes of the clerk (Tr. 18):

"I find for plaintiffs \$3,000.00 for disability the first year; \$58,500 general damages, including future expenses; and \$3,473.88 specific expenses."

Certainly the appellant cannot complain of the sustaining of its own motion to have findings amended, and it is obvious that the amended findings simply conform to the original award in the oral pronouncement of the court at the conclusion of the taking of testimony. This action of the court would appear to be permissible under Rule 60-a of the Federal Rules of Civil Procedure.

Appellant employs rather an ingenious argument, using annuity valuation tables as applied to the case at bar. The trial court did not use annuity tables in measuring appellee's damage.

"Mathematical computation. The amount of recovery cannot be reduced to a mere matter of mathematical computation; hence it cannot be

measured by taking a sum the interest on which would produce the amount previously earned by the plaintiff, nor do rules, to be derived from standard life and annuity tables, furnish an absolute guide for the discretion of the jury." 25 *C.J.S.* (Damages) Sec. 81, p. 595.

Factors to be considered in arriving at the ultimate award are pain, suffering, disfigurement, future corrective surgery, and past and future loss of earnings proved with reasonable certainty, all of which are present in the case at bar.

It must be borne in mind that in actions brought under the Federal Tort Claims Act, the right of trial by jury is denied. The judgment of the trial court is substituted for that of a jury. In this case, it would appear that the trial court is firmly of opinion that appellee's injuries and disability were such as to justify the award. The trial court had an opportunity to change the award. In fact such change was pressed upon him, but he refused.

The following is a pertinent quotation from the Montana Supreme Court in a case where a plaintiff's award in the sum of \$76,112.00 was sustained:

"The trial judge, with the jury, sat through the harrowing details of the accident and the long drawn out campaign to rehabilitate, so far as possible, the wreck of a human being left by the accident; saw plaintiff's condition and was able to understand, in some measure, the agony and suffering through which he had passed." *Fulton v. Chateau County Farmers' Co.*, 37 P. (2d) 1025 at 1034

Counsel for appellant appear to distort fact when they assert at page 13 of their brief "that he was incapacitated to a degree of 60% and was earning at least \$3,000.00 a year. He has an earning capacity on his own of 40% or \$1200.00 for the balance of his life." The undisputed fact is that appellee's disability for all purposes is 60% to 75% (Tr. 124). We consider this point sufficiently important to set forth for the convenience of this court, the testimony establishing the percentage of disability.

THE COURT: Doctor, if you were fixing a percentage such as Doctors fix in the young men at the veterans hospitals, in fixing the percentage of disability for the Government such as they do, what would you fix? That is also taking into consideration all the things that could asked you about?

(DR. GRIEVE) A. Well, the Veterans administration seem quite generous in most cases. I would say in this man's case it is sixty to seventy-five per cent.

Q. THE COURT: That is the amount of disability he will have? A. Yes, sir.

THE COURT: I take it he was totally disabled all the time he was under your care?

A. Yes sir.

THE COURT: What do you consider to be his disability at this time, what is the percentage of disability to work right now?

A. I think it is over seventy-five per cent right now; it is eighty per cent or more now. He cannot work a full eight hours, he cannot be on his feet for any length of time, and he cannot be on the job at all for a full working shift. (Tr. 124-125)

The testimony with respect to disability was not questioned by appellant's expert medical witness. Therefore we believe that we may fairly assert on behalf of appellee on the basis of all of the testimony that his permanent total disability is seventy-five per cent of total for all purposes.

Moreover, we believe that it is fairly evidenced, taking into consideration appellee's past earning record, that he would with reasonable certainty, have earned a greater sum than \$3,000.00 annually. His average annual earnings from the year 1942 to 1946 is \$4,061.41, exclusive of the capital gain of \$6,382.19 realized from the sale of his farm (Tr. 80, 81).

It is generally recognized by writers of judicial opinions that each personal injury case, insofar as amount of recovery is concerned, should be individually treated. No two cases are exactly alike although there

may be comparable features. It is impossible to adequately describe the injuries and the effect thereof upon the appellee. To properly appreciate them, one must see him as an aid to interpretation of the descriptive testimony of his injuries by both lay and expert witnesses. There are but few cases reported where a litigant sustained injuries in the number and severity as was sustained by the appellee for the obvious reason that where such injuries occur, the normal end result is death. We have cited two cases where recoveries were sustained on comparable injuries in excess of the amount allowed here. *McDonald v. Standard Gas Engine Co.*, 47 P. (2d) 777, 8 Cal. App. (2d) 464; *Fulton v. Chateau County Farmers' Co.*, 37 P. (2d) 1025. We assert that the award in this case should have been more than that allowed by the trial court, but in any event, it does not represent anything other than fair compensation.

CONCLUSION

We respectfully submit that the recovery allowed by the trial court was not excessive, taking into consideration all of the factors which appear in this case, and should be affirmed.

Respectfully submitted,

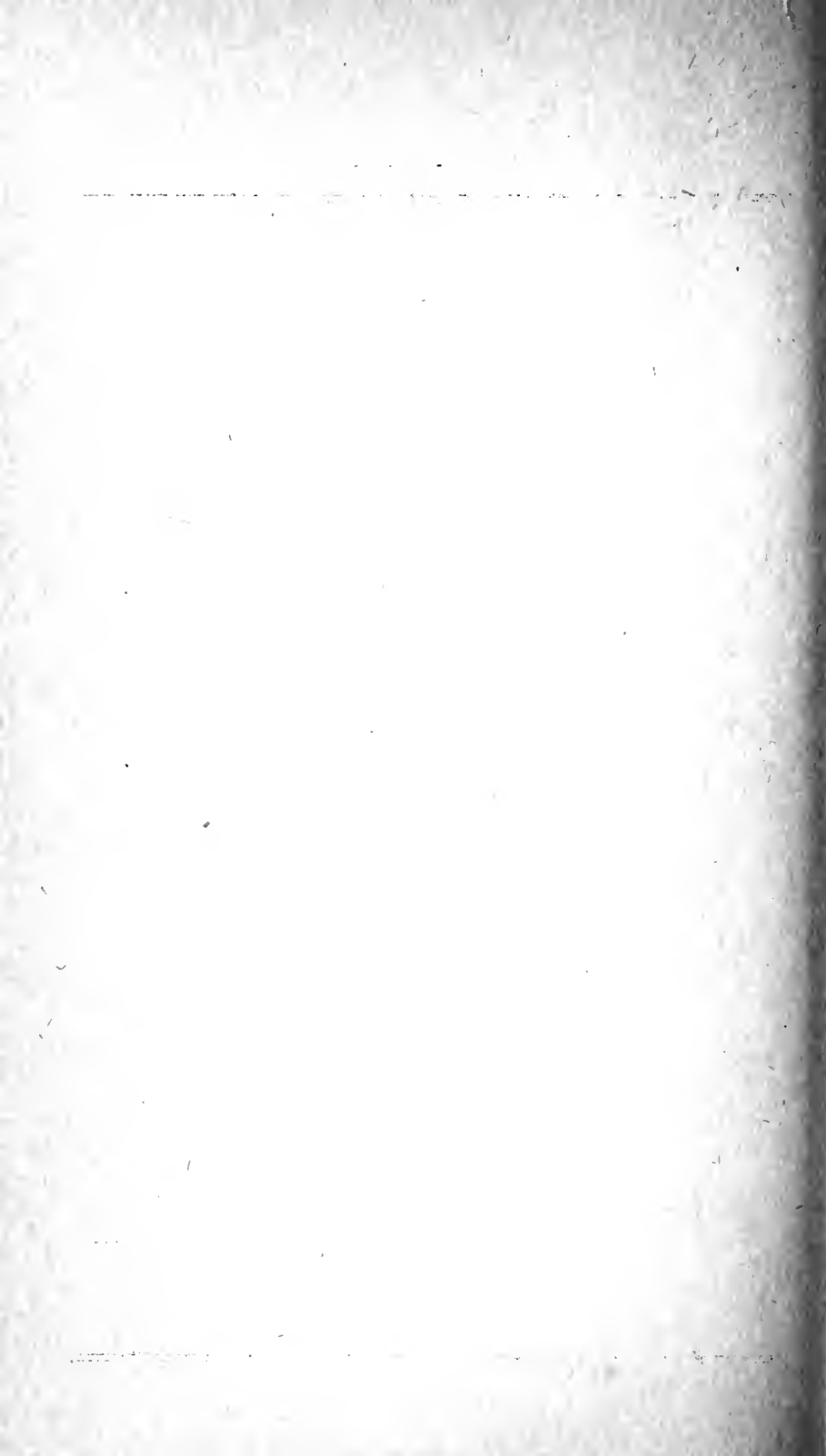
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In the United States
Circuit Court of Appeals
Ninth Circuit

REPLY BRIEF OF APPELLANT

_____, Clerk



No. 12,162

In the United States
Circuit Court of Appeals
Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*

VS.

RAYMOND DOWNUM and

EMMA DOWNUM, husband and wife, *Appellees.*

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States
for the District of Idaho
Northern Division



The Appellant herein replies to the brief of the Appellee. In Appellant's brief we presented to the Court arguments and contentions that the lower court committed error in that, generally, the damages were excessive, that the award for future loss of wages were excessive and erroneously arrived at, and that the Court was without authority to amend the Findings of Fact. Now, without going into these arguments again, in the detail they were presented in the original brief, attention should be called to the fact that the Appellee casually dismisses our arguments as being "specious" and "ingenious." These things cannot be dismissed so lightly. They are important and go to the heart of the appeal by Appellant. Counsel for Appellee does discuss the question of the excessiveness of the award and concludes, generally, that "the recovery allowed by the trial court was not excessive, taking into account all factors which appear in this case." Appellant urges upon the Court consideration of the other questions raised in this record.

With respect to using the Annuity Valuation Tables in determining the award for loss of future earnings, it is conceded by all of the authorities that the use of such tables is not a fixed and binding rule upon the Court, but is only a standard or a gauge—some method which the Court can use to approximate a man's earnings over a period of years. Our examination of the authorities in this field of law, lead us to the conclusion that the use of an annuity table in determining

loss of future earnings is increasing, and that courts, generally, are turning to this type of evidence and especially in awarding amounts for loss of future earnings. We do not believe that their use and value to a Court can be so lightly dismissed.

The Appellant is well aware that the Appellee did suffer as a result of this accident, but counsel for the Appellee in arguing in his brief attempts to set forth the degree of disability varying from 60 to 75 per cent. Appellant contends that the degree of disability is fixed by the finding of the Court at 60 per cent, and the same holds true as to the finding of the average annual wage. We think counsel for Appellee confuses the issue by showing that the Appellee made a capital gain of \$6,382.19 from the sale of the farm, when discussing the average annual income of the Appellee. What this has to do with Appellee's earning record, we fail to see. It has nothing to do in determining what the Court should award for loss of future earnings. The Court found that the Appellee had an average annual income of \$3,000 per year, and this has to be the basis of the award for loss of future earnings. It must be conceded, and all authorities hold to this point, that as the man grows older his earnings will necessarily diminish. In our first brief, we conceded, for the sake of the argument, that the Appellee would earn \$3,000 to the date of his death, and gave him the benefit of this constant annual income, which, of course, substantially raises the total of the loss of future earnings.

Counsel, in their brief, fail to answer to our contention that the Court should not have lumped together the award for pain, suffering, and past and future loss of earnings. Again, we state that we do not know whether the amount was awarded for future earnings, or whether this amount was for pain and suffering, or what ratio each bore to the total award.

Appellee places great reliance on the Montana case in which an award of \$76,112.00 was sustained. (Fulton v. Chauteau County Farmers' Co., 27 P. (2d) 1025 at 1034) and (McDonald v. Standard Gas Engine Co., 47 P. (2d) 777, 8 Cal. App. (2d) 464.) In connection with these citations, we point out one was a Montana case, and the other a California case. No Idaho cases are cited. Federal Tort Claims Act (28 USCA 931 et seq.) follows the law of the state in which the accident occurs, which is the Idaho law, and governs the measure of damages in this case.

CONCLUSION

In conclusion we urge that this matter be reversed, and we submit that error was committed by the lower court in lumping the award as it did, or in making one finding and award. Further, that the award is excessive under all the facts and the law.

We urge that the lower court be reversed upon the grounds and for the reasons we have heretofore set forth in this record.

Respectfully submitted,

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for the District of Idaho;

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for the District of Idaho;

SHERMAN F. FUREY, JR.,
Assistant U. S. Attorney
for the District of Idaho.

No. 12163

**United States Court of Appeals
For the Ninth Circuit**

o—o—o

DANEBO LUMBER COMPANY, INC., a Corporation,
and MARK C. STORMS, Individually,
Appellants,

vs.

KOUTSKY-BRENNAN-VANA COMPANY,
a Corporation,
Appellee,
and

KOUTSKY-BRENNAN-VANA COMPANY,
a Corporation,
Cross-Appellant,

vs.

DANEBO LUMBER COMPANY, INC., a Corporation,
and MARK C. STORMS, Individually,
Cross-Appellees.

o—o—o

**Upon Appeal from the United States District Court
for the District of Oregon**

o—o—o

**BRIEF OF APPELLEE AND CROSS-APPELLANT
KOUTSKY-BRENNAN-VANA COMPANY,
A CORPORATION**

o—o—o

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FILED

MAY 12 1949

PAUL P. O'BRIEN,

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No. 12163

United States Court of Appeals
For the Ninth Circuit

o—o—o

DANEBO LUMBER COMPANY, INC., a Corporation,
and MARK C. STORMS, Individually,
Appellants,

vs.

KOUTSKY-BRENNAN-VANA COMPANY,
a Corporation,
Appellee,

and

KOUTSKY-BRENNAN-VANA COMPANY,
a Corporation,
Cross-Appellant,

vs.

DANEBO LUMBER COMPANY, INC., a Corporation,
and MARK C. STORMS, Individually,
Cross-Appellees.

o—o—o

Upon Appeal from the United States District Court
for the District of Oregon

o—o—o

**BRIEF OF APPELLEE AND CROSS-APPELLANT
KOUTSKY-BRENNAN-VANA COMPANY,
A CORPORATION**

o—o—o

ISSUES INVOLVED

The contentions of parties are sufficiently set out in appellants' brief and in the pre-trial order, beginning page 14 through to page 38, so that appellee deems it unnecessary to repeat the statements here. We proceed,

therefore, to answer the contentions of appellants without encumbering the record with too much repetition.

Questions Raised by Appellants

The appellants, on page 11 of their brief, set out three principal propositions or questions involved in this appeal:

“1. It is an inflexible prerequisite to the maintenance of a suit in equity that the plaintiff (appellee) come into court with clean hands. The complaint and *all evidence admitted in support thereof* conclusively show that the plaintiff (appellee) is not in court with clean hands with respect to the matters upon which it seeks relief.

“2. The complaint and the *evidence introduced in support thereof* conclusively show that the cause of action grows out of, and is based upon an unlawful and illegal conduct knowingly and deliberately entered into for and in pursuance of an unlawful and illegal purpose in direct violation of the Emergency Price Control Act of 1942 as amended. Hence the plaintiff has no other standing either in a court of equity or a court of law.

“3. There is no competent evidence to establish the averment that said option given by the appellant Storms to the plaintiff (appellee) was a sham or other than what it purports to be, nor is there any competent evidence to show that either the appellant Danebo Lumber Company, or the appellant Storms violated the OPA regulations or violated the Emergency Price Control Act of 1942 as amended or otherwise entered into any unlawful agreement or conspiracy. Therefore, the judgment is not supported by the evidence and is contrary thereto.”

On page 12 they set out their specification of errors which are practically the same as their propositions of law.

On page 13 they set out what they claim is the findings of fact by the Court.

That finding of fact is not complete and shows on its face that it was just supplementing the brief statement which the Court made at the end of the trial.

That statement at the end of the trial is found at the bottom of page 142 of the transcript of the record and is as follows:

“The Court: My holding will be this—I will amplify these findings at an appropriate time.

“This was a conspiracy which all the parties engaged in, the buyers and the sellers, to violate and evade the Price Control Act and appropriate regulations thereunder; and I feel under the circumstances of the case, that the plaintiff is entitled to recover against the Lumber Company, defendant, and as against Storms, defendant. As to that, I will file a written memorandum later, but generally speaking, it is on the theory of money had and received and unjust enrichment.”

At the bottom of page 13 of appellants brief they had a fourth error claiming that the Court erred in not rendering judgment in favor of the plaintiff-appellee and against the appellants for the reason that said judgment is not supported or justified by the evidence and is contrary thereto. Then follows the argument.

Before answering appellants' argument we pause at this time to call the Court's attention to the fact that although the appellants in the District Court designated for appeal the complete record, including everything that occurred during the trial, in their designation in the Court of Appeals they only designated part of the record, and did not print all of the evidence, exhibits, or depositions

taken prior to the final hearing, which was on June 1, 1948. This statement is clearly shown by the certificate of the Clerk of the District Court, which is found on pages 44 and 45 of the transcript of the record. There the Clerk certifies that he has enclosed under separate cover a duplicate transcript of proceedings of June 1, 1948, together with the depositions of Jack A. Cooper, et al., and deposition of Charles M. Kincaide, Jr., also Exhibits 1 to 13, inclusive, 13-A and 14 to 25, inclusive, also proposed pre-trial order.

In the transcript that appellants had printed in this Court they omitted all the depositions of Cooper, et al., the deposition of Charles M. Kincaide, Jr., and all the exhibits except 1, 2 and 3. Therefore the complete record is not set out in the transcript, and it is our contention that appellants cannot under this state of the record raise the question that the findings of fact are not supported or justified by the evidence, and is contrary thereto. We will discuss this question when we reach that part of the argument in which they claim the right to review the findings of fact as not supported by the evidence.

Appellants' Statement of the Case

There was a pre-trial conference had in this case before Judge Fee and a pre-trial order prepared under his direction, but it was never signed by Judge Fee. When the case came up for trial it was heard before Judge McColloch and said pre-trial order that was prepared was signed by all the parties but was not signed by any Judge, but it was received in evidence at the trial by Judge McColloch as a stipulation or agreed statement of facts.

It is found in the transcript of record beginning at page 11 and ending at page 44. In that agreed statement

of facts it is admitted (page 15 of the record) that the plaintiff issued its check to the defendant Mark C. Storms, dated July 20, 1946, in the amount of \$15,000.00, and delivered said check to the defendant Charles M. Kincaide, Jr., and the said Charles M. Kincaide, Jr., thereafter delivered said check to the defendant Mark C. Storms, and the said Mark C. Storms thereafter endorsed said check to the defendant Danebo Lumber Company. That the Danebo Lumber Company received the money on said check. That no lumber shipments were made and no lumber sold by the Danebo Lumber Company to the plaintiff. That the defendant Danebo Lumber Company and Mark C. Storms refused to return said \$15,000.00 or any part thereof, although so demanded by the plaintiff. That the plaintiff's pre-trial Exhibit 1 is an agreement dated September, 1946, entered into between the defendant Danebo Lumber Company and the defendant Charles M. Kincaide, Jr. That the \$15,000.00 check given by the plaintiff to Kincaide was delivered in Omaha, Nebraska, on July 20, 1946, and that the option agreement dated August 29, 1946, plaintiff's pre-trial Exhibit 2, was received by plaintiff through the mail from Kincaide. That the Danebo Lumber Company a corporation, was chartered on August 15, 1946, with an authorized capital of \$150,000.00, composed of 1,500 shares of common stock of \$100.00 each. That Mark C. Storms was and is the president of the company, and John C. Willener was and is the vice-president and manager and that John J. Gregory was and is secretary-treasurer, and that the above named are the directors of the corporation and all the stockholders thereof. That all these Danebo Stock options were similar in form as the option that was introduced in evidence here, and that Mr. Seitz, attorney for the defendant-respondent, Storms, and Danebo Lumber Company, Inc., drew all of them similar in form. Exhibit 7

was a similar option agreement given by John C. Willener to A. F. Christensen dated August 29, 1946, and that at the same time John J. Gregory gave an option to the Farmers Co-Operative Union of Oakland, Nebraska, for ninety (90) shares of stock of the Danebo Lumber Company, Inc. That John J. Gregory gave an option to Charles M. Kincaide, one of the defendants-respondents in this cause, for fourteen (14) shares of stock of the Danebo Lumber Company, Inc. And John J. Gregory gave an option to the Landy-Clark Lumber Company of Lincoln, Nebraska, for ninety (90) shares of the Danebo Lumber Company, Inc., stock. And John J. Gregory gave to F. O. Akin an option for ninety (90) shares of stock of the Danebo Lumber Company, Inc. That Mark C. Storms gave an option to Charles M. Kincaide, Jr., defendant-respondent herein, for sixty-two (62) shares of stock of the Danebo Lumber Company, Inc. That Mark C. Storms gave an option to the Hoppe Lumber Company, of Lincoln, Nebraska, for one hundred fifty (150) shares of stock of the Danebo Lumber Company, Inc. That Mark C. Storms gave an option to the Harberg Lumber Company of Papillion, Nebraska, for one hundred fifty (150) shares of stock of the Danebo Lumber Company, Inc. That John C. Willener gave an option to A. F. Christensen Lumber Company of Fremont, Nebraska, for ninety (90) shares of stock of the Danebo Lumber Company, Inc. That John C. Willener gave an option to Searle & Chapin Lumber Company of Lincoln, Nebraska, an option for ninety (90) shares of stock of the Danebo Lumber Company, Inc. And John C. Wilener gave an option to Charles M. Kincaide for fourteen (14) shares of stock of the Danebo Lumber Company, Inc. All options were given for the same amount per share, \$250.00 per share, all Danebo Lumber Company, Inc., stock, and there was a

total of 1,420 shares issued and subscribed for, and these options covered all the issued capital stock of the Danebo Lumber Company, Inc. It is admitted that Mr. Kincaide early in the year 1946, probably in June, had a conference with Mr. Storms in Eugene, and at that time Mr. Storms stated to Mr. Kincaide that they were organizing a corporation to construct and operate a saw mill at Danebo Station. That they had the thing partly set up, they expected to incorporate shortly; that they needed additional finances and they said to Kincaide, if you can get these additional finances along the line which you say you can, namely, through options on stock of the new corporation; if you can get someone to take options on this stock, we will tie up to you a certain percentage of the output of this mill. Mr. Kincaide said he thought he could do that. He said he thought he had someone who would be willing to do that. Neither the defendant Storms, nor Danebo Lumber Company, knew whom Mr. Kincaide had contacted, nor did they know whom he intended to contact, if anyone. But it later developed that in July Mr. Kincaide in the meantime had been to Omaha or in the East and came back and stated that he had the money, and that he had, among others, this \$15,000.00 check of plaintiff's. When Kincaide got back he contacted Mr. Storms and told him he was ready to take an option, so Mr. Kincaide and Mr. Storms got together. At that time the corporation, Danebo Lumber Company, had not been organized. After all that had been done, Mr. Storms and Mr. Kincaide got together and drew the option. When the option was signed and delivered to Mr. Kincaide, Mr. Kincaide delivered the check to Mr. Storms. Mr. Storms endorsed the check. At the same time the contract, plaintiff's pre-trial Exhibit I, was executed between Danebo Lumber Company and Mr. Kincaide.

It is further agreed that the Court shall take judicial notice of the Emergency Price Control Acts and all Rules and Regulations in force during the period of this controversy.

Contentions of Plaintiff

It is the contention of the plaintiff-complainant that it was in the retail lumber business in the city of Omaha, Douglas County, Nebraska, and was unable to get lumber from the wholesalers or from the mills at what was then the O. P. A. ceiling price. That they were compelled in order to do business at all as a going concern to agree to pay more than the ceiling price in order to get lumber.

That the defendant-respondent, Charles M. Kincaide, Jr., was a wholesaler engaged in the selling of lumber wholesale, and was also a mill representative and held himself out as representing certain mills which were engaged in the manufacture of lumber. That he and defendant-respondent, Mark C. Storms, had entered into a tentative plan whereby they were to try to get retail lumber companies like plaintiff-complainant to advance money for the purpose of getting lumber, and that pursuant to said tentative agreement said Kincaide, representing himself and acting as agent for Mark C. Storms' interest, came to Omaha and contacted the plaintiff-complainant and other retail lumber dealers in Nebraska and elsewhere, and the said Kincaide and the plaintiff-complainant represented by Mr. George Vana entered into an agreement whereby said Vana was to advance the sum of \$15,000.00 for the purpose of getting lumber over the ceiling price, and under said agreement said lumber when sold or purchased was to be invoiced at the then prevailing O. P. A. ceiling price, but there should be added to that the sum of \$10.00 per 1,000 feet of lumber, said excess to

be taken out of said money advanced until said advanced payment was exhausted.

That it was further part of said agreement that in the event the O. P. A. should go off then the lumber should be furnished at the then prevailing market price as established by the Weyerhaeuser interests and the Long-Bell Lumber Company interests, and the lumber should be invoiced at \$10.00 *under* the market price, and the additional \$10.00 per 1,000 feet should be deducted from the moneys advanced until said money should be used up.

In the event that the advanced payments were not all used up in this matter, the remainder of said advance payments should be refunded to the plaintiff-complainant. That this was a common scheme or plan devised by defendants-respondents to evade the O. P. A. regulations. That the same plan had been previously used in similar transactions. That the sum of \$15,000.00 was advanced on this agreement, but no lumber was ever delivered, although repeated demands were made therefor. That as part of said scheme to evade the O. P. A. regulations an option agreement was to be given to the plaintiff-complainant, represented by Mr. George Vana, who entered into an agreement whereby said Vana was to advance the sum of \$15,000.00 for the purpose of getting lumber over the ceiling price, and under said agreement said lumber when sold or purchased was to be invoiced at the then prevailing O. P. A. ceiling price, but that there should be added to that the sum of \$10.00 per 1,000 feet of lumber, said excess to be taken out of said money advanced until said advanced payment was exhausted.

That as part of said scheme to evade O. P. A. regulations an option agreement was to be given to the plaintiff-

complainant to purchase stock, but the name of the mill was not given, and the amount advanced was purported to be the payment for said option, but that this was not to be enforced; that it was a sham-contract devised by the defendants, Mark C. Storms and Charles M. Kincaide, Jr., for the purpose of covering up the illegality of the transaction under the O. P. A. regulation, and was never to be exercised. That the lumber was to be delivered within 90 days of said payment of said money and these payments were advanced by check by the plaintiff-complainant in the sum of \$15,000.00 on July 20, 1946.

That this plaintiff-complainant brought this action to rescind and cancel said so-called agreement and is asking that the money be refunded to them on the theory that this is purely an executory contract as far as plaintiff-complainant is concerned.

It is the further contention that the money advanced went to the Danebo Lumber Company and they still have the money and refuse to refund it.

It is plaintiff-complainant's further contention that Kincaide acted as the agent of said Mark C. Storms, and the Danebo Lumber Company was supposed to be later organized as a corporation and that Kincaide, Jr., was the agent of said defendant-respondent, Mark C. Storms, and the supposed Danebo Lumber Company, and if he was not their agent and unauthorized to make the agreement that they made with plaintiff-complainant defendants-respondents cannot receive the benefits of the agreement as made by Kincaide, and not assume the burden, and if the defendant-respondent, Storms, and Danebo and Kincaide received the plaintiff-complainant's money they would have no right if the agent acted beyond his author-

ity to hold the money and they should refund it to the plaintiff-complainant.

It is the plaintiff-complainant's further contention that no dealings or agreements were had directly between the plaintiffs and the Danebo Lumber Company, Inc., defendants herein, nor Mark C. Storms, defendant herein, and whatever dealings or agreements were made between the parties were handled by the defendant, Charles M. Kincaide, Jr.

Defendants' Contentions

The defendants deny the contentions of the plaintiff and assert:

That in the matter involved in this action the defendant, Charles M. Kincaide, Jr., was not the agent or representative in any way of either the Danebo Lumber Company or Mark C. Storms. That the defendant, Charles M. Kincaide, Jr., delivered said \$15,000.00 check payable to Mark C. Storms to Mark C. Storms when and only when said Mark C. Storms executed and delivered the option (pre-trial Exhibit 2) to the defendant, Charles M. Kincaide, Jr., and that thereafter the said Charles M. Kincaide, Jr., delivered said option to the plaintiff. That the said option (pre-trial Exhibit 2) was not intended as a sham agreement, but was and is a valid, binding agreement which is and at all times has been in force and which the plaintiff has the right to exercise. That the understanding between the defendant, Storms, and the plaintiff was in accordance with said option (pre-trial Exhibit 3), and no further, different or other agreement of any kind was entered into or intended.

That the agreement entered into between said defendant, Charles M. Kincaide, Jr., and the defendant, Danebo

Lumber Company (plaintiff's pre-trial Exhibit 1) is and was intended to be a valid, binding agreement, and that the defendant, Danebo Lumber Company, is now and at all times has been ready, able and willing to perform said contract on its part to be performed.

The Issues of Law Contended by Defendants

The defendants, Danebo Lumber Company, Mark C. Storms and Charles M. Kincaide, Jr., submit:

1. That the plaintiff is not entitled to recover under the allegations of its complaint for the reasons (1) that the whole transaction as alleged and upon which the plaintiff relies was and is for the purpose of procuring lumber at prices in excess of the ceiling established by the Office of Price Administration and for that reason illegal and unlawful; (2) that the plaintiff at the time of entering into the arrangement or agreement upon which the cause of action is based knew that said agreement or arrangement was illegal, in violation of law, and it was done with a deliberate and considered purpose. Therefore, the plaintiff is not in Court with clean hands and is not entitled to any relief whatsoever.

Issues of Law Contended by Plaintiff-Complainant

1. It is the plaintiff-complainant's contention that they have the right to show that the agreement herein entered into was similar to previous agreements that had been entered into between the parties and other retail lumber companies, and that it was part of a general scheme devised by defendants-respondents to obtain lumber in excess of ceiling prices, and the general plan can be shown by similar transactions with other dealers.

2. That the plaintiff-complainant has the right to show by parol evidence that these contracts, although

apparently valid on their face, were entered into as sham contracts, and that they were entered into for another purpose even though that purpose was an illegal one.

3. That we have the right to show by parol evidence that this contract, although apparently valid on its face, was part of a larger agreement, and that the whole contract was partly in writing and partly oral, and that it was the intention of the parties that the contract should not be exercised and was a mere cover-up or sham to evade the O. P. A. regulation.

4. That under said circumstances, when the proof shows that the agreement, although illegal, is still executory, and is not "*malum per se*" but only "*malum prohibitum*," and the money is paid down on such an agreement, that the party paying down the money may bring an action, as this was brought, and set up the illegal agreement and recover the money from the persons to whom it was paid, or who received it under said illegal agreement upon two (2) theories:

(1) On the theory that the plaintiff-complainant, who was a retail lumber man, was not in *pari delicto* with the wholesaler or mills, defendants-respondents herein, in that they were willing to deal, if possible, under O. P. A. regulations, but that the defendants-respondents refused to furnish lumber at O. P. A. prices and, therefore, the parties not being equally guilty, the Court will aid the one less guilty in recovering his money back, and cancelling the contract.

(2) That even though the Court should find that the parties are equally guilty but still the transaction is only *malum prohibitum* and the contract is still executory, the party to the contract who pays the money under said il-

legal agreement has the right to go into equity and cancel or rescind the contract and recover the money paid, on the theory that while the contract is illegal public policy is better conserved by allowing recovery of the money than by permitting the other party to retain an unjust enrichment. (See pre-trial Order and Stimulation, pages 14 to 34, Record).

On page 47 of the Transcript of the Record it appears that all of these exhibits that were identified at the pre-trial conference were offered and received in evidence and also all depositions of the various witnesses taken in Omaha now on file. (See also bottom of page 48, Transcript of the Record, that the Court received both the exhibits and the depositions.) At pages 49 to 52 these exhibits and depositions are shown in detail.

ADDITIONAL TESTIMONY TAKEN AT THE HEARING BEFORE JUDGE McCOLLOCH

George J. Vana, General Manager of the plaintiff, was called as a witness on behalf of plaintiff and his testimony is set out in question and answer form, beginning at page 54 of the Transcript of the Record, and he testified that in 1945 and 1946 and possibly a little previous to that time, it was almost next to impossible to get lumber in the regular way and through regular channels under O. P. A. prices. It always meant that you had to engage in some sort of a proposition whereby you could get this lumber in order to keep in business. (Bottom of page 55.) That he had an overhead to maintain and he tried to keep business going and it was very difficult *because it was next to impossible to get lumber in the regular channels. He was willing at that time to buy lumber, if he could, at O. P. A. ceiling prices.* (Page 56.) He met Kincaide at about that time and had considerable dealings

with him as a lumber broker. On April 4, 1946, Kincaide came to his office with a proposition about buying lumber over the O. P. A. ceiling. *At that time it was next to impossible unless you engaged in some sort of a proposition in order to obtain it*, so Mr. Kincaide said he had a deal whereby, if we would put up \$7,000.00, we could get a certain amount of lumber at over the O. P. A. ceiling, for a certain length of time, so he explained the situation to me and he said that we were to put up \$7,000.00 and later on we would get some sort of an instrument; that this instrument would not represent anything at all; it would be *just sort of a sham*; that the real contract would be what he and I agreed upon, or agreed in substance, something like that.

I gave him the \$7,000.00. Then they were to start shipping us lumber within a couple of weeks at a certain rate and the prices we were to pay over and above the O. P. A. ceiling was \$10.00 for common lumber and \$20.00 for what we called the better grades of material, kiln dried (bottom, page 57).

Witness gave Kincaide a check payable to Peter Walton (bottom, page 58) and Kincaide said that I should give him this check for \$7,000.00, which was to buy certain amount of lumber at over the O. P. A. ceiling rate, and that Mr. Walton would give us a purported option or something, some sort of an instrument which we were supposed to keep in our files in the event, Mr. Kincaide said, somebody would come along to check up, so we could show that we had this thing, but he said that would only be a sham, it would not be the real intention at all; that the real intention was for us to buy lumber at over and above the O. P. A. ceiling, at \$10.00 and \$20.00 a thousand above O. P. A. ceiling; for any thousand feet of lumber we would

get they would take \$10.00 out of the \$7,000.00 for common and for every thousand feet of finished lumber they were to take \$20.00 a thousand until this \$7,000.00 was used up. This lumber they were buying was to be invoiced at O. P. A. ceiling and the \$10.00 or \$20.00 above was to be taken out of this \$7,000.00; witness entered into that kind of a deal with Kincaide. After he signed the check with reference to the Eclipse transaction, witness got what they called an option (p. 59). It was sent through the mail by Kincaide after witness had given him the check. The plaintiff bought lumber and paid the excess over the O. P. A. price, and the excess was taken out of the \$7,000.00 check, and the lumber invoiced at O. P. A. price (p. 60). Later when they had a certain amount of lumber shipped Kincaide figured out how much was earned against this \$7,000.00, then he came to plaintiff's office to pick up the purported option, and at the same time gave plaintiff a release for that option to indicate that everything was settled up and that it was O. K. But in that purported action they went ahead and sold the mill before some of the people who were in this deal had gotten all their lumber, so there was something coming, some money to come back, and Kincaide gave plaintiff a check for \$500.00, and asked him to sign that check for \$500.00, and said that he was going to take it along with him, that he was going to give it to some of the other dealers, and then he figured out, after we had gotten our lumber, that we were \$42.55 short of the \$7,000.00 sufficient to pay for this lumber over the O. P. A. ceiling, so witness gave him this amount in cash, and they settled that transaction (pp. 60 and 61). After this Eclipse deal he had the deal in controversy with Kincaide. This second deal occurred in their office on July 20, 1947 (p. 61). Kincaide brought up the proposition that this Eclipse deal had gone through so wonderfully well and we started to get lumber about

two weeks after the deal was made, and it was completed satisfactory to everybody; that he had another deal along the same line and wanted to know whether we wanted to participate. *Of course it was still hard to get lumber* and we said yes, if we had the same kind of a deal along the same lines the Eclipse deal was made, we would participate (p. 62). This new deal was to cost us \$5,000.00 a unit. In other words, if we took three units we would be paying \$15,000.00, and we would get a certain amount of lumber for that \$15,000.00. We were buying it on the same deal as the Eclipse deal; that we were paying \$15,000.00 to get this lumber and then pay \$10.00 a thousand over and above ceiling, and that was to be deducted out of the \$15,000.00 that we advanced on the contract with Kincaide. It was to be invoiced at O. P. A. ceiling after they took out \$10.00 a thousand on this check. The remainder we were to pay for in cash (p. 63). If the O. P. A. went off they were to get lumber at the market prices following the Weyerhaeuser and Long-Bell's market prices as a guide which had been set for us, because they were the leaders in the industry and naturally would have a line of prices which would practically be satisfactory to everybody, and you would not have to pay a lot of fictitious prices for lumber, and Kincaide said if the O. P. A. went off we would use Weyerhaeuser and Long-Bell's prices, and the lumber would be invoiced to us and we would get a credit of \$10.00 a thousand over Weyerhaeuser and Long-Bell's prices (p. 64). And if the O. P. A. was off we would take \$10.00 a thousand off of Weyerhaeuser and Long-Bell's prices, and they would invoice it for \$10.00 less than that until the advance funds were exhausted (p. 65). Then Kincaide said, "Now, of course, you know, like in the Eclipse deal, there will be a purported option set up and you will get one of these for your file, in the event anything comes up and the Government

checks up to find out if there is any violation, and you can show them that you have got this purported option. It is supposed to protect you, but you won't have to pay any attention to that. That thing will be a sham, just a cover-up deal'' (p. 65). Pursuant to that agreement the check was made out for \$15,000.00 and Kincaide took it along with him, and he told witness to make it out to Mark C. Storms. He said to make it out that way, just like we did to Peter Walton. Witness never asked him any questions, because the Peter Walton deal went through nicely, and he said this was the same kind of a deal, so I naturally would not ask him any questions about making it out to Storms. Witness had the utmost confidence in Kincaide. They had lots of business transactions before and had gotten along smoothly and had no reason to believe that there would be anything different in this deal, for he told him it was going to be just like the previous one. The lumber was supposed to be shipped ninety days after July 20. Nothing was said about the Danebo Lumber Company at that time (p. 66). Kincaide said that he was going to make similar deals with other retail lumber dealers. Nothing was said as to where the lumber was to come from (p. 66). They got something in legal form like, and witness put it in his file without ever reading it. *That was the sham option that Kincaide had referred to* (Ex. 2, p. 68). When the deal was originally made with Kincaide, nothing was said about the number of shares nor what was the total amount of the option. No investigation was made as to the financial responsibility of the Danebo Lumber Company. They just took Kincaide's word that everything was all right. Never dealt personally with Storms or any officer of the Danebo Lumber Company. Talked to no one but Kincaide (p. 69). And the whole transaction took about thirty minutes. Never received any lumber under the deal, although plaintiff requested lumber accord-

ing to the deal with Kincaide, but they did not produce on that basis. Witness had another deal in September, 1946, referred to as the Douglas Fir Products Company, and that check was made out to Mr. Furrow for \$5,400.00. That was September 10, 1946 (Record, p. 70). Plaintiff received a similar option in that deal from Mr. Kincaide, and he dealt with Kincaide only. Never had any dealings with Furrow at all. Furrow's deal was just like the Eclipse and the Danebo and the proposition was to get lumber at over O. P. A. ceiling prices, and it was to be handled on the same basis, the lumber to be invoiced at O. P. A. prices and the excess of \$10.00 a thousand feet taken out of the advanced money until exhausted. *Plaintiff never at any time had any purpose to buy stock in any of these concerns, nor did Kincaide offer to sell any stock.* The purpose was for us to give him this money so as to get lumber over the O. P. A. prices, and the options were nothing but a sham. The plaintiff tried to get lumber under the Douglas Fir Company deal, and Kincaide wrote that the market was pretty strong and they would not let loose of the lumber unless we would pay the market price and it was fixed at so high a price that the witness wrote Kincaide and told him that he could buy all the lumber he wanted for a whole lot less, and never received any lumber from any of these deals, and in May, 1947, had a meeting in the Paxton Hotel in Omaha and Mr. Kincaide and several of the retail lumber dealers were present, and the purpose of the meeting was to get an explanation from Kincaide as to how the thing was going. Everybody wanted to get some lumber at the prices agreed upon, but they were unable to do so, and Kincaide told them at the time that it looked like he could not do anything for them and that we would have to pay the market prices and lose the money we had advanced, and those present said there was no use in buying any lumber from these people on that

basis. All present claimed that the purported options they were given were to get lumber over the O. P. A. ceiling and none of them were getting it, and Kincaide got up and solemnly swore before these people that he would swear that these purported options were a sham and that the object of the thing was to get lumber over the O. P. A. ceiling prices, and these options were just to cover up (p. 74). Then he produced for the first time his contract with the Danebo Lumber Company, which is Exhibit 1 in this Record. And it was suggested at that meeting that the retailers were still willing to buy lumber if they could get it at a fair price, and Kincaide was to see what he could do (p. 75). Some of the retailers brought up the proposition they would pay the market prices if they could get \$10.00 a thousand credit against the money they advanced on these deals, and Kincaide said the Danebo people would not do that and if the retailers wanted lumber they would have to pay \$75.00 or whatever the market price was at the time, and the dealers suggested there was no point in buying lumber at the market and letting him keep the \$10.00 a thousand (p. 76), and he was to take it up with these two companies, the said Danebo and Douglas Fir Companies, and they never got a foot of lumber.

On cross-examination (p. 97) witness again stated that it was *next to impossible to get lumber at O. P. A. ceiling prices* and he bought lumber from Kincaide and paid him over O. P. A. prices, because you could not get any lumber unless you paid over O. P. A. ceiling. Witness got reports from about one hundred to two hundred people in the shingle business and that they were buying over O. P. A. and a lot of lumber dealers were doing the same thing, and *you could not stay in business unless you did*, and *witness stated he could not afford to get out of business* (p. 98). You could not get lumber from anywhere in the United States unless you paid over O. P. A. prices (p.

99). The Eclipse deal was the first one that involved option deals (p. 100). Kincaide said he already had the deal made and he was bringing the proposition to the witness, not like he was coming to the witness and then going over and making a deal. The deal was already made and witness understood that the lumber was coming from a certain source (p. 101).

Charles Kincaide was called by the defendant and the Court said to Kincaide: "I think I should give you a special warning before you start to testify. This is a case of a very unusual sort, and I am not going to tolerate what we call hard swearing. You keep that in mind. This is a court of justice and you have just taken an oath to tell the truth, the whole truth and nothing but the truth. Lots of times in the rush of things people forget that they were sworn before they take that chair" (R. p. 104).

Kincaide testified that he was in the wholesale lumber business in 1946 in Portland; that he bought lumber from mills and sold it to the wholesalers and industries (p. 105), and he testified that he was down at Eugene and talked with Mr. Storms. That was at the time *lumber was hard to get*, and it was brought up that they were thinking of building a mill near Eugene, and they wanted some money to finance it. That they needed about \$60,000.00, and did witness think he could maybe raise it, and we discussed that we could maybe make out a deal by selling options on stock to raise this money. The mill at that time had not been built, or the Danebo Lumber Company had not been incorporated. Witness told Storms that he thought he could find some dealers that would be interested if he could have the output of the mill and they said he could have the output of the mill in a certain quantity. Then he proposed to work up the deal with these dealers

(p. 107). After this conversation he got in contact with Mr. Vana and told Vana that if he purchased an option in one of these \$5,000.00 units he would be entitled to receive that amount of lumber. This was to be at ceiling prices as long as O. P. A. was in, and after it went out it would be at the market price. *No lumber was ever shipped* (p. 109). When O. P. A. went off the mill was not yet completed and Kincaide did not get any lumber because the dealers were not willing to pay the market price, and he admitted that he was present at the meeting at the Paxton Hotel, where he said he would see what he could do, but he was unable to do anything (p. 110). He said that he reported back that he had contacted the Danebo people, and they would not agree to the proposals that they had suggested. There were two or three of these proposals. One was that they offered to settle on a basis of 50 per cent of the money back. *He was not sure of that; might be off a little.* The other was that they would take the lumber less \$10.00 a thousand. He put these propositions up to Danebo and they were rejected (p. 111).

On cross-examination by Mr. Seitz, who represents Storms and the Danebo Lumber Company, Kincaide stated that the first conversation he had with Storms at Eugene, which led up to the deal, was along in the *spring of 1946*, and that they were talking about *how hard lumber was to get*, and Storms said that they intended to organize a new mill down at the Danebo Station and that they needed additional financing to build and equip a mill, and witness offered to see if he could get dealers interested (p. 112) and he went back to Omaha and, among others, talked to Mr. Vana, and he reported back that he had gotten dealers interested and had the money, and that it was Kincaide and Storms that agreed upon the options (p.

113), and he was asked if the amount of the options was suggested by Kincaide in order to dovetail in with his arrangement back in Omaha, and Kincaide said it was suggested by you (referring to Seitz) or Mr. Storms, and then he said it was suggested by Storms; and the options were finally drawn up on the 29th of August and delivered (p. 114), and during all of that time witness retained possession of all these checks, including the one given by Vana. He was then asked if he ever ordered any lumber under these contracts and he said he *tried to but could not get it because of the price. There was a disagreement as to the market price*, and witness could not say that Danebo refused to sell him lumber at the market price, but there was a question as to *what the market price was* (p. 115). Kincaide admitted he had a prior deal known as the Eclipse Lumber deal, and Vana was in on that same basis, and while the lumber was purchased from Kincaide in that deal the bills of lading ran direct from the mill to Vana, and Kincaide said that was customary (p. 116). Kincaide admitted that prior to the Eclipse deal, that all the deals he had with Vana were sold to him on a commission basis, and that Kincaide did not get into the wholesale business until O. P. A. established the amount that a wholesaler could charge and at that time the mills paid the commission (p. 117).

On cross-examination by Mr. Winters, Kincaide admitted that when he came to Omaha in July and talked to Mr. Vana about this deal, in which Mr. Vana gave him the check, to Mark C. Storms there was nothing said about \$250.00 a share for part of the stock, nor that Vana was to get 490 shares, and that the Danebo Lumber Company was not mentioned because the name had not been set at that time, and he didn't recall definitely whether

he had even named Storms, nor did he mention the value of the stock to the other retail dealers who went into similar deals (p. 118). He told them there would be an option drawn and that this money would be put up as purchasing the option and for doing that they would get a certain amount of lumber from Kincaide, and when asked what was to become of the money that was put up in these units he said that was paid for purchasing these options; it went out of his control; that the option was drawn up in a bona fide way but the *general understanding was that the options would not be exercised* (p. 119), and that was taken for granted; and when asked what was said at the meeting at the Paxton Hotel by Kincaide he answered, *everybody was of the same opinion that the options were not to be exercised*; and that was true of the Eclipse deal and as a matter of fact in the Eclipse deal they sold out before the options had expired and refunded part of the money, and they refunded this money because the money that was put up had not been eaten up by the lumber sold. That was the general understanding (p. 120). He claimed that he could have gotten some lumber from the Danebo Lumber Company after the ceiling price went off, but he didn't try to get any before the ceiling price went off because the mill was not completed. He admitted that he told Vana and the others that the mill would be operating and could furnish lumber in ninety days, but that he didn't guarantee that. He admitted that this Danebo deal was the same kind of an option that he had with the Eclipse, along the same lines, and that he made similar options with the Douglas Fir Company afterwards, and he admitted that the Eclipse sold out before the exercise of these so-called options expired (p. 122); and at the bottom of page 123, Transcript of the Record, he was asked if this money that was put up

was put up for the purpose of paying the excess over the ceiling price, and he answered that the *dealers never figured that way because the lumber was sold at ceiling prices and if they were not going to exercise their options they would naturally figure that option money was part of their cost price, and they could figure that out themselves.*

Q. That was your understanding?

A. Certainly that is the way anybody would figure it out.

Q. If they didn't exercise their option?

A. That is the way it would look.

Q. You figured that all the time when you dealt with these options, *that they were options to evade the O. P. A.?*

A. *That was the extent of it.*

Q. And you said so in this circular you set out *November 27, 1946*, which you admitted in your deposition you sent out to all of them?

A. That is right, I admitted it.

Q. You told them to cover it up?

A. The purpose of that was so that they would not make any mistake and try to deduct the option money from their income tax, which might be questioned by the income tax people.

Q. You mean that it might be *an evasion of the O. P. A. ceiling price?*

A. *The same thing applies there.*

Q. You refer to in your letter, to these options, and suggest that *these options were evasions*?

A. *That is right.*

Q. You cautioned them to destroy the circulars?

A. I asked them to return them.

Q. And not keep a copy?

A. Because they were confidential, for their own protection as well as everybody else's. (p. 124)

Q. And for your protection?

A. That is right.

Q. Protection from what?

A. From what?

Q. O. P. A. prosecution? (p. 125)

Mr. Mark Storms, defendant, then testified that this deal first came up in the latter part of *June, 1946*. Mr. Kincaide was in the office of the Monroe Lumber Company and in the course of the conversation witness suggested that he had a mill site at Danebo Station and we were contemplating building a mill there if we could raise some money to do it with, and Kincaide wanted to know whether we would be interested in giving him an option on the output of the mill in return for raising money through *options on stock*. Witness told him that they would be interested and agreed that if he could raise \$60,000.00 through some of these people in the middle west they would give him a contract on 80 per cent of the cut the first year, 70 per cent the second year and 60 the third (p. 127). Kincaide said that he thought that some of his people around Omaha would be interested in purchas-

ing options on the stock in order to raise the money. That conversation was some time *between the middle and last of June*. Around the first of August he reported back he had the money and was ready to sit down and draw the options. He said he had interested his people in options and had the money and was ready to sit down and draw a contract. Storms immediately incorporated the Danebo Lumber Company and Kincaide was in Seitz's office when the options were drawn up, and he suggested the number of shares to his different colleagues (p. 128). He gave us the idea that he had sold or broken them down into twelve units. That was the way he wanted the options drawn, and when asked how the purchase price of these options was arrived at, the price per share, he said that was set by the officers of the Danebo Lumber Company and based upon their past experience and ability in the lumber business, and after the options were completed and signed, the checks that Kincaide had, including the \$15,000.00 check, were delivered to Storms and the options were delivered to Kincaide (p. 129), and the contract, Exhibit 1, was delivered at the same time to Kincaide (p. 130). As far as the options were concerned, the options were *drawn* in a bona fide way and on a bona fide basis, and the first I heard of any sham in regard to the options was when we met Mr. Winters the latter part of August, 1947 (p. 131). He states that he is ready and willing to perform the option and with reference to the contract he had with Kincaide he never refused to deliver any lumber on that contract (p. 123). He claims that he had no contract with Kincaide or the plaintiff or its representatives, other than expressed in those two contracts, Exhibits 1 and 2, that is, the option and the contract. He admitted that he never had any dealings with Mr. Vana or any of the rest of these op-

tionees directly, and he never gave to Kincaide any authority to negotiate any of these contracts, or any of these options with anyone. He did not give any authority to Kincaide or any other wholesaler (p. 132). He never authorized nor in any way suggested how these checks should be drawn (p. 133). None of the option holders ever exercised their options and he claimed that he was not to furnish lumber to any of these people, that he was dealing with Kincaide and Kincaide was not his agent in making these deals. He never had any authority to act as our agent. He said that he had clients in and around Omaha that he thought would be interested (p. 136), and he claimed that these options were bona fide. It was witness' version that he was selling all the stock of this corporation, giving options to sell it, and that he used all of this money to install and equip the mill, one hundred per cent, and in addition thereto put in some \$60,000.00 of his own money, and the mill was not equipped in time to furnish lumber prior to *April 1, 1947* (p. 137). And he claimed that although these people advanced money so that he could build his mill and equip it to the full extent that was done, that there was no obligation to furnish them lumber, and that his contract was with Kincaide to furnish him lumber, and that he never had any dealing directly with plaintiff or any of these retail lumber dealers, nor did anyone else connected with the Danebo deal directly with them (p. 138). He admitted that he heard of the option method being used to evade the O. P. A. (p. 139), and when asked if he didn't know that the lumber that Kincaide was to receive under his contract was to be supplied by him to the persons holding the options in satisfaction of his obligation to furnish them lumber, he answered, "The idea was that we were to furnish lumber to him on his order," and then he was asked whether

he knew at that time that there were definite options totaling \$60,000.00, if he didn't have any idea that the lumber he was to furnish Kincaide under this contract was to be furnished by him to these people who had the options and he said, "We had that idea, yes" (p. 140).

Then on cross-examination by Mr. Winters he was asked what was his idea in going ahead and getting money to finance this mill and then selling the stock out in options to someone else to take charge of it, and he stated his purpose was primarily to raise money to build the mill, and if the optioners saw fit to exercise their options that was up to them (p. 140). He then was asked why he would want to raise money to operate the mill, and then at the same time give options to sell all of the stock:

A. Primarily to raise money to equip the mill. They took their chances whether the options would be exercised.

Q. If this was a bona fide option you contemplated to build it and then the other people would take charge of it?

A. We didn't know. We drew the options so that they could exercise them, and they can still exercise them. (p. 141)

ARGUMENT

Appellants, in their argument beginning on page 14 of their brief, make the contention that the Court should have denied relief to appellee under what was designated as the Clean Hands doctrine, and that is that no suitor can invoke the aid of a Court of equity unless he comes into the Court with clean hands and that this rule applies regardless of how unclean the hands of the defendant may be, and they go on to say that in order to invoke the

maxim against a suitor it is, of course, essential that the Unclean Hands must relate to the subject matter upon which the cause of action is based.

With this general rule we have no controversy, but it is our contention that it is not applicable to the case at bar. We make the general statement that that rule applies solely to actions where the suit is brought to attempt to enforce or carry out the illegal contract or where it is brought to recover the money or property given under the illegal contract after it is fully executed. It is our contention that this suit was brought under neither of these theories.

This suit is founded upon the theory that the money paid down, which is sought to be recovered herein, was paid under an illegal contract; that the said contract was still executory; that no lumber was ever delivered under said alleged contract while OPA regulations were on, nor was any lumber delivered even after OPA regulations went off, which was some time in November, 1946. That the defendants got plaintiff's money, refused to deliver any lumber under the agreement, and refused to return the money advanced under said illegal contract; and that the plaintiff elected to rescind said contract on the ground that it was an illegal transaction before the illegal agreement was carried out, and both sides have abandoned the contract, and therefore we have the right to rescind and recover our money back upon two theories: **first**, that under the facts and circumstances as shown by the evidence we were not in *pari delictor* and were compelled on account of **economic coercion** to enter into this illegal contract, and we were therefore the least guilty of the parties to this agreement and could rescind and recover our money back.

Second. That even though we were in *pari delicto*, as the contract was not in violation of a law *malum per se*, but was only in violation of a statute, *malum prohibitum*, and the contract was still executory and the illegal part not carried out and fully executed under what is known as the Repentance Rule, either party to such an agreement may repudiate the illegal contract, rescind and recover back the amount paid thereunder.

Parties Were not in *Pari Delicto*

We will first discuss the question of whether or not the parties were in *pari delicto*.

The Court in its finding of facts did not pass upon the question as to whether or not the parties were in *pari delicto*, but found generally that the parties were engaged in a violation of the O. P. A. regulation and that the plaintiff paid money down under that violation and the defendants, Mark C. Storms and the Danebo Lumber Company, got their money and no lumber was ever delivered under said agreement, and under the Unjust Enrichment rule they would not have the right to keep our money, and judgment was rendered against the appellants for the amount that we paid down. Discussing the question now as to whether or not we were in *pari delicto*, we call the Court's attention first to the case of *Ring v. Spina*, 148 F. (2d) 647. That was a case where the plaintiff sued the defendant for treble damages under a contract which he alleged was in violation of the Sherman Anti-Trust Act. A temporary injunction was issued, restraining the defendants from violating the contract. From an order vacating the injunction plaintiff appealed, and the Court applied the principle that where one party to an illegal contract acts under duress of another the

parties are not in *pari delicto*. The defendants claimed that the plaintiff was not entitled to relief because he signed the basic agreement which, among other things, promised any of its members to lease or license a play; defendant limits contracts by both managers and authors to those made under its own terms, and they must be in good standing with the guild. It appears that plaintiff signed this agreement which was in violation of the Sherman Anti-Trust Act. The plaintiff was interested in the production of a play known as "The Stovepipe Hat," and he claims that he signed this restrictive agreement in violation of the Sherman Act *against his will* and under *coercive* pressure and rules and regulations of the guild, in order that he might protect his part in the venture. A dispute arose between the parties, as the defendants claimed that the plaintiff made changes in the play which breached the basic agreement above referred to, and they therefore terminated his contract. The play was forced to close, and therefore he sought this injunction and relief. The lower Court, in denying the motion for temporary injunction, stated that not enough facts had been furnished to indicate that the basic agreement was void under the Sherman Act, but it went further and held that the transaction there involved was not in interstate commerce and that relief should be denied since the parties were in *pari delicto* and since plaintiff was seeking at the same time to be awarded *rescission and enforcement* of a contract.

The Circuit Court held that this agreement was in violation of the Sherman Act. The evidence in the case showed that plaintiff had invested considerable money in the production of this play, taking over another party's production contract, and before he invested that money

he endeavored to enter into a direct contract with the authors. But he found that impossible until he, in turn, became a member of the guild in good standing by signing the basic agreement. The rules of the guild permitted no other course; thus he had to sign to save his \$50,000.00 investment and to safeguard his future attempts to bring the venture to fruition. The Circuit Court then states that "this seems to us a *prima facie* showing of *economic coercion*." In discussing this again the Court said (p. 652):

"It is well settled that where one party to an illegal contract acts under the duress of another the parties are not in *pari delicto*, and in actions for treble damages under the Sherman Act a showing of economic duress similar to that asserted here has been held sufficient proof that the plaintiff is not a party to the monopoly." (Citing numerous cases.)

They go further then and say there appears to be a definite tendency to hold those not actively engaged in promoting monopoly to be the victims, rather than participants in anti-trust violations. Thus it is well settled that dealers and solicitors for a combination may sue as soon as they are dismissed and claim damages for such dismissal.

Quoting from Judge Chase in the case of *Connecticut Importing Co. v. Frankfort Distilleries*, one of the cases referred to above, 101 F. (2d) 79 (81):

"This is not a suit in equity where the clean hands doctrine is applicable, but merely a suit on a special statute which takes no account of the conduct of the plaintiff prior to the time the cause of action arose."

We are not going as far as this case. We are not seeking to recover under any statute, nor seeking to re-

cover money paid after the contract is *completely executed*, nor are we attempting to enforce an illegal contract. On page 653 of this case, the Court makes a distinction between a victim, rather than a participant in an alleged conspiracy. This case acknowledges the general rule that where the parties have been actually and truly in *pari delicto*, the Court should leave them where it finds them. An examination of the cases cited supporting that rule will show that every case, such as the ones cited by appellants in this case, are cases where the parties seek to recover *on the contract after it is executed*, or where they are seeking to *enforce the provisions of the illegal contract*, and, of course, the Court will leave them where it finds them. Then this Court on the same page makes this statement:

“But here even without a showing of economic coercion as the final step in forcing him to sign the Basic Agreement, plaintiff is precisely the type of individual whom the Sherman Act seeks to protect and considerations of public policy demand the court’s intervention in behalf of such a person, even if technically he could be considered in *pari delicto*. Indeed this is a general principle applicable beyond the anti-trust field.”

Citing *Thomas v. City of Richmond*, 79 U. S. 349, 12 Wallace 349, which is one of the leading cases holding that we can recover the money paid under an illegal contract where it is executory and the illegal agreement is *not consummated*.

In *Johnson v. Harmon*, 328 Ill. App. 585, 66 N. E. Rep. (2nd) 498, the rule is laid down where parties to a contract against public policy or otherwise illegal are not in *pari delicto* or equally guilty, public policy is considered as advanced by allowing either the *least or the more ex-*

cusable of the two to sue for relief against the transaction, relief is given to him. The least guilty of two parties to an illegal transaction, especially where he has been fraudulently induced to become a party to the action, may recover what he has paid to the other party to the unlawful enterprise.

In *Council v. Cohen* (Mass.), 21 N. E. (2d) 967, the rule is laid down that courts will not aid in the enforcement, nor afford relief, against the evil consequences of an illegal or immoral contract, but where parties are not in equal fault as to illegal element of the contract or where there are elements of public policy more outraged by the conduct of one than of the other, then relief in equity may be granted to the less guilty. In the case the owner had given a second mortgage in violation of the H. O. L. C., and they not only allowed them to rescind the contract, but went further and allowed them to recover the money paid with interest on the theory that they were not in *pari delicto*.

In *Badger Coal and Coke Company v. Sterling Midland Coal Company*, 180 Wis. 79, 192 N. W. 461, where the defendant, a wholesale seller of coal, while an order issued by the President under the Lever Act limiting the prices of coal was in force, dated orders taken by plaintiff back to a time before the executive order took effect, and exacted from him for coal so sold and delivered, an excess price, the plaintiff could recover the amount so unlawfully exacted, he not being in *pari delicto* with the defendant. The Court quoting with approval from 3rd Add. Con. (3rd Am. Add.) 520 as follows:

“The law also implies a promise to refund money received under an illegal contract, where the plaintiff does not stand in *pari delicto* with the defendant. When contracts, for example, are prohibited by stat-

ute, for the purpose of preventing one set of men from taking advantage of the necessities of others, and the money is paid upon such contracts by one of those whom the law intended to protect, the person who has so paid his money does not stand in *pari delicto* with the person who has received it, and may, after the *forbidden transaction is completed*, bring an action upon a promise implied by law from the person who has got the money, to *refund it*."

And it is our contention, therefore, that under these authorities that we were not in *pari delicto* with the defendant. The uncontradicted evidence shows both by the plaintiff and the defendants that *lumber was hard to get*. That these retailers, including the plaintiff and all others as shown by the depositions, could not get lumber from the wholesalers or mill operatives *without paying over ceiling prices*. That they were ready and willing to buy lumber at O. P. A. ceiling prices, but they could not do so. That they were engaged in the retail lumber business and had to, if they wanted to remain in business, pay more than ceiling prices, and that they were, therefore, under *commercial coercion or duress*, and they were, therefore, the least guilty of the two parties to this illegal contract, and they were not in *pari delicto*, and under this theory were entitled to rescind the contracts and recover their money back.

Can Rescind Even if in *Pari Delicto*

Plaintiff could also rescind and recover his money back where the illegal contract *was not carried out and was abandoned*, and the leading case that we rely upon, as stated by appellants on page 52 of their brief, is *Spring Co. v. Knowlton*, 103 U. S. 49, decided October 1, 1880. Appellants seek to distinguish that case from the case at bar, first, on the ground that it was an action at law and

not in equity, but we will show as we go along that the rule that we are seeking to recover under applies as well *in equity* as it does in law. There Knowlton paid money on a subscription to the increase of the capital stock in violation of the statutes of New York. Knowlton paid the first installment and when the next installment became due, he refused to pay and the board by resolution forfeited the amount paid and cancelled his subscription. Knowlton wanted his money back and he sued to recover it, and appellants further state that it will be observed that the corporation abandoned the contract as well as Knowlton. It is our contention that there is no distinction between our case and the Knowlton case and the evidence here is overwhelming that *no lumber was ever delivered while the O. P. A. regulations were in force* because the lumber could not be obtained for the reason that the *mill was not completed until April 1, 1947*, and the overwhelming evidence of all of the witnesses is to that effect, as shown by the evidence set forth in this brief, that no lumber was ever delivered *thereafter* under this agreement that was made by plaintiff, under the agreement that the lumber was to begin to be shipped ninety days after the check was given by the plaintiff to Mr. Kincaide, and that was on July 20, 1946, and although repeated demands were made by the plaintiff for lumber, none was ever offered to be delivered at any price prior to April 1, 1947, according to all of the witnesses.

After April 1, 1947, no lumber was ever delivered under this agreement, which was that if the O. P. A. went off, then the lumber was to be delivered according to the market price as fixed by Weyerhaeuser and the Long-Bell Company; the lumber was to be invoiced at \$10.00 to \$12.00 *under the then market price*, and the other \$10.00 *was to be taken out of the money advanced*.

Going back to the Knowlton case, the Supreme Court stated that it was conceded by the defendants in error that the plan adopted by the company to increase its stock was in violation of the law of New York and, therefore, void. Then the Court said:

“We are then to consider whether upon the hypothesis that a plan for the increase of the stock was illegal, there can be recovery upon the facts of the case as found by the Circuit Court.”

The Court in that case said there was no performance of the contract whatever *by the company* and *only a part performance by Knowlton* and that the making of the illegal contract was *malum prohibitum* and not *malum in se*, and the Court said there is no moral turpitude *in such a contract*. We contend that this expression that there is no moral turpitude in such a contract refers to *contracts that are just malum prohibitum* and not *malum in se*. The Court then goes on to say:

“The question presented is, therefore, whether conceding said contract to be illegal, money paid by one of the parties in part performance can be recovered, the other party not having performed the contract or any part thereof, and both parties have abandoned the *illegal agreement* before it was consummated. We think the authorities sustain the affirmative of this proposition, and going over a book on contracts we quote the following: ‘Where money has been paid upon an illegal contract, it is a general rule that if the contract be *executed*, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid, but if the contract continues *executory* and the party paying the money be desirous of rescinding it, he may do so, by an action of *indebitatus assumpsit*, for money had and received.’ And this distinction is taken in the books, that where the action is in affirmation of an illegal

contract, the object of which is to *enforce* the performance of an engagement prohibited by law, clearly such an action can in no case be maintained, but where the action proceeds in disaffirmance of such a contract and instead of attempting to enforce it presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derives *from an unlawful act*, then it is consonant to the spirit and policy of the law that the plaintiff should recover. And citing Parsons on Contracts they approved the following: 'All contracts which provide that anything should be done which is distinctly prohibited by law or morality or public policy, are void, so he who advanced money in consideration of a promise or undertaking to do such a thing, may, at any time before it is done, rescind the contract, and prevent the thing from being done, and recover back his money.' The Supreme Court said that the views of the texts quoted are sustained by a vast array of authorities, both English and American. They approved the following from another case: 'If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out or if he seeks to enforce the illegal action, in neither case can he maintain an action.' This Court followed *Thomas v. City of Richmond*, 12 Wall. 349, to the effect that a recovery can be had as for money had and received when the illegality exists in the contract itself, and that contract is *not executed*. In such case there is a *locus penitentiae*; the delictum is not complete; the contract may be rescinded by either party. The Court goes on to say that this rule is applied in a great number of cases, even when the parties to the illegal contract are in *penitentiae delictum*, *the question of which of the two parties is the more blameable is quite immaterial*. We therefore think the facts in this case present no obstacle to a recovery by

Knowlton's administrators of the sum paid by him on the stock which has been subscribed for by Sheehan. In the first paragraph the record shows that Knowlton was an *active party in devising this scheme*, and it was claimed on that account by the plaintiff in error that he could not recover his money back."

Appellants say, page 53 of their brief, that Judge Harlan wrote a vigorous dissenting opinion. That is not true. In that dissenting opinion Judge Harlan did not express his own views upon the propositions of law discussed in the opinion of the Court, but he dissented solely upon the ground that as the State Court of New York, in the case of *Knowlton v. Congress and Empire Spring Company*, 57 N. Y. 517, had denied the right of recovery upon the facts set out in the Court's opinion, that their decision should have been accepted as the law of the case. Not only is that true, but in the case of *Parkersburg v. Brown*, 106 U. S. 487, where the city entered into an illegal contract and was the principal offender in issuing city bonds in violation of the municipal charter, the city bonds were held void, but that the purchaser of the bonds, relying on the illegal contract, as it was only in violation of the law *malum prohibita*e, following the *Spring v. Knowlton* case above, could recover his money, and Justice Harlan wrote that opinion.

This Knowlton case was approved in *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 31 L. R. A. 415 (6th Cir.). It was a case where several corporations engaged in the manufacture of the same goods entered into an agreement by which it was provided that the parties should organize a corporation to manufacture the goods. That the stock of such corporation should be allotted to the several parties in certain proportions; that the parties should convey

all their property of every kind to the new corporation and receive therefor mortgage bonds of such corporation; each of the parties agreed not to engage thereafter in the manufacture of the goods. The new corporation was organized; the stock issued and conveyances of the property according to the agreement were made to such corporation, but it did not immediately take possession of the property of the Merz Company. While still in possession of its property the Mertz Company determined to withdraw from its engagements and so notified the officers of the new corporation, tendered back the stock and demanded a rescission of the contract. This was refused. Thereupon the Mertz Company filed its bill *in equity* to cancel the agreement and restrain interference with its property, and the new corporation filed a cross-bill demanding specific performance of the agreement. The Court held that these agreements forming part of one *plan* by which the Mertz Company was to abandon the exercise of its corporate powers and restrict itself to the holding of the stock of another corporation were *ultra vires and void*, and the Court held that as the agreement was still in part *executory* and had been promptly disaffirmed by the Mertz Company, the rule as to estoppel of parties in *pari delicto* did not apply, and cancellation of the agreement with an injunction against interference with the property of the Mertz Company might be granted, and dismissed the cross-appeal for specific performance. Judges Taft and Lurton, both Circuit Judges, took part in that decision, and Lurton wrote the opinion, both becoming members of the Supreme Court thereafter. The Court in that case (page 795) said undoubtedly if the parties are in *pari delicto*, and the contract has been *fully executed* on the part of the plaintiff, and *has not been repudiated by the defendant*, neither a Court of law nor equity

will lend its active assistance to the recovery of property or money paid on such contract or aid in bringing about its surrender or cancellation. The doctrine of the Courts applicable were stated aptly by Justice Gray in *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 407, 12 Sup. Ct. 953, which is a case referred to by appellants in their brief on page 34. The extract referred to in the McCutcheon opinion, taken from the 145 C. S., is to the effect that equity or law will not aid a party to an illegal contract whether to enforce or set it aside, but if the contract is illegal affirmative relief against it will not be granted in law or in equity unless the contract remains executory or unless the parties are *considered not in equal fault*, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. Quoting with approval *Thomas v. Richmond*, 12 Wall. 349 (355), and *Spring v. Knowlton*, 103 U. S. 49, and quoting further from the 145 U. S. to the effect that while an unlawful contract, the parties to which are in *pari delicto*, and it remains executory, its invalidity is a defense in a Court of law and a Court of equity will order its cancellation, only as an equitable mode of making that defense effectual and when necessary for that purpose. And in referring to the Clean Hands Rule attempted to be relied on by appellants in this case they say, that when the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy, and the Court in that case held the contract still executory and granted equitable relief against its enforcement, saying that there is an obvious distinction be-

tween the attitude of a complainant asking relief against an unexecuted agreement, illegal for reasons not appearing upon its face, and where it is sought to recover back money or property paid upon a contract fully executed. The Court said that the case of *Spring v. Knowlton*, 103 U. S. 49, is highly instructive and supports the proposition that affirmative relief may be extended to one of the parties in *pari delicto*, where the contract is unexecuted, and he be desirous of rescinding it, provided the contract was not one *malum per se*, and the injunction granting equitable relief and cancelling the illegal contract was affirmed.

That Justice Harlan did not disapprove the rule in the Knowlton case is evidenced by the case of *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. Rep. 832, where the plaintiff was sued to recover certain money which he alleged he had given to the defendant to hold on deposit, the defendant offered to show that the money claimed by the plaintiff to have been deposited with him, to be paid to him on his order, was so deposited with the intent to cheat and defraud his creditors. The Court excluded the evidence and Justice Harlan held that the evidence, if admitted, would not have relieved the defendant; that the plaintiff's suit to compel the return of the money may be regarded as one in disaffirmance of the arrangement under which defendants claimed to have received it, and if successful would tend to defeat the alleged purpose of defrauding his creditors by having it kept upon secret deposit with the defendants. It is not a suit to recover money received and paid out under an illegal or immoral contract which has been *fully executed*. The suit is necessarily a *disavowal* upon the part of the plaintiff of any purpose to hide this money from his creditors. To allow

the defendant to retain it upon the ground that he had originally the purpose to conceal it from his creditors would be inconsistent with the spirit and policy of the law. Citing as his sole authority, *Spring v. Knowlton*, 103 U. S. 49 (58), and authorities there cited.

In *Mueller v. Stoecker Cigar Company*, 89 Neb. 438, 131 N. W. 923, the Nebraska Court held that the contract for the purchase of a cigar store, where part of the goods and fixtures purchased consisted of a number of slot machines kept in use in the store for the purpose of gambling, is an illegal contract, and so long as the same remains executory, may be repudiated and rescinded, and the money paid thereon may be recovered back by the person paying the same, citing *Stover v. Flower*, 120 Ia. 514, 94 N. W. 1100, where the Iowa Court stated:

“It is quite generally held that so long as an illegal contract remains executory and the illegal purpose has not been put in operation, the one who has paid the money thereon to the other party may repudiate the contract and recover back the money. This has been spoken of as the right of repentance.” (Citing the *Spring v. Knowlton* Case, 103 U. S. 49; *Wasserman v. Sloss*, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; *White v. Franklin Bank*, 22 Pick. 181; *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. 356, 1 A. S. R. 301.

Citing, also, *Munns v. Donovan Commission Co.*, 91 N. W. 189, where the Iowa Court said:

“If defendant was to make purchases on board of trade of commodities, with the intent that the difference between the contract and market prices be settled in money, and there should be no actual delivery of the property, the plaintiff and Cruzen had the right to repent of their wrongdoing and revoke

the authority given, at any time before the purchases were actually made. Having discovered the error of their ways, the law not only permits them to withdraw from the transaction, but extended to them a helping hand by offering the inducement of giving back to them that which they had parted with."

The Wasserman case in the 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 A. S. R. 209, just cited, is where a stockholder transferred his stock to the president of the corporation, which was to be used in corrupting certain persons in the renewal of leases held by the corporation of which the president was an officer, but such influence was not exercised, and the stockholder demanded a return of the stock before it was so used. The Court held that he could maintain such an action to recover it under the Repentance Rule. The Iowa case also cited *Barnard v. Taylor*, 23 Ore. 416, 31 Pac. 968, 37 A. S. R. 693, 18 L. R. A. 859, which case involved a suit to recover money that was put up on a bet. There the party who paid knew the race was fixed in advance and was a bogus race, in fact, it was designed so that he could recover money that he had lost in a prior bet, and the Court in that case held that even though it was an illegal contract and both parties were in *pari delicto*, still they had the right, before the illegal contract was carried out, to repent and recover the money back. That Oregon case cited with approval *Stansfield v. King*, 62 Kan. 801, 64 Pac. 614, in which case there was an illegal contract entered into to sell intoxicating liquor in violation of the prohibitory liquor law, but before the deal was carried out the party who paid the money down to buy the liquor, rescinded the contract, and the Court held that under the repentance rule, that the money paid therein may be recovered back. This same rule was followed in Kansas in *Ware v. Spinney*, 76

Kan. 296, 13 L. R. A. (N. S.) 273, 9 Pac. 787, 13 Am. Cas. 1181. An early New York case is cited in several of these cases, that of *Morgan v. Groff*, 4th Barb. 524. where the Court held that money paid down on an illegal contract may be rescinded and recovered back, either in law or in equity.

In *Gehres v. Ater* (Ohio), 73 N. E. (2d) 513, the Supreme Court of Ohio, on May 21, 1947, held that at common law one may withdraw from a wager and retain or recover his property or money before it goes into the hands of the winner, even after the result of the wager is known and the loser may repudiate a wager and retain his money or property or recover it in a common law action, so long as title to the property has not passed to the winner. This is not a recognition of the illegal contract but a recognition of the right to repudiate it, and it applies even though a statute declares the gambling contract void. In that case the plaintiff deposited with the defendant a certain bond to secure the payment of the alleged debt for money lost in a gambling deal, and discussing this question the Court said (p. 517):

“The broad principle that when parties enter into an illegal agreement, the courts regard them as *in pari delicto*, and consequently will leave them where they find them, affording no relief either in law or in equity, is subject to a number of exceptions, one of which is that where a contract prohibited by law is not *malum in se*, but *malum prohibitum*, and has not been fully executed, either party may rescind the contract and have relief in justice both in law and in equity. The principle upon which the exception is made is that the policy is best subserved by granting locus penitentiae to a party, and by permitting him to disaffirm the contract, prevent the execution of it,

and authorize the party so disaffirming to recover money paid or grant him equitable relief against the enforcement of the contract, the court again saying the courts allow a party, even though he is *in pari delicto*, repudiates the agreement while it is executory, to recovery whatever he has given thereunder, recovery being not under the agreement, but in disaffirmance of it on a promise implied or a right existing independently thereof. Accordingly it has been held in many cases that where the matters called for in the agreement that render it illegal, do not involve turpitude but are merely mala prohibita, either party, while it remains executory may disaffirm it on account of its illegality, and may recover money back or property that he has advanced under it.”

Citing the *Spring v. Knowlton* case, 103 U. S. 49, and *Bernard v. Taylor*, 23 Ore. 416, cited above.

In another recent Ohio case, 70 N. E. (2d) 503 (Ohio), that of *Suburban Home Mortgage Co. v. Hopwood*, the mortgage company conveyed property to defendant's wife, as security for payment to defendant of a broker's commission, which could not be legally paid defendant because he was not a licensed real estate broker, and the property was to be re-conveyed if commission was not paid or completed sale not made. The Court first held that under this kind of an agreement, the company was precluded, under the clean hands doctrine, from recovering property so conveyed, since the transaction was one designed to circumvent the real estate broker's act. The suit was by the mortgage company against the defendant for an accounting of the monies received from the sale. However, on rehearing of this case, 73 N. E. (2d) 519, the Court stated that they had given the matter their most careful attention, and reached the conclusion that they carried the clean hands doctrine too far in not recogniz-

ing a distinction between illegal contracts based upon a consideration that is *malum prohibitum*, from those where it is *malum in se*, and that the former opinion correctly stated the law as to the latter, but not as to the former, and after quoting in detail the rules to be applied in the former situation, the Court on rehearing reached the conclusion that independent of any statute, as long as the illegal act remained wholly unexecuted, the party parting with his money, may repent, abandon his contract and recover back the money paid the object being to prevent wrong done, by encouraging such repentance and abandonment. The Court further held that to deny the plaintiff the right to recover under those circumstances would permit the defendant to collect for services which he had not performed, and for which in contemplation of the parties, he was not to be paid for. In that last case the opinion stressed the fact that the penalty was only on one side and the appellants make that point in their brief, but many of the cases seem to give that little consideration.

In a recent case in California, *Severance v. Knight-Counihan Company*, 29 Cal. (2d) 561, 177 Pac. 4, 172 A. L. R. 1107, it was held that an agreement between employer and employe, made at a time when the employers financial condition was unsound, and both parties were concerned with the possibility of further decrease in the employer's business, and the accumulation of further indebtedness, rendering the employer unable to pay the full amount thereof, giving the employe an option to purchase certain assets of the employer, at a price less than their actual value, is void as in fraud of the rights of future creditors, even though it may be admitted that creditors existing at the time of the agreement could have been sat-

isfied, and may not be enforced by the employe simply because the employe was less at fault than the employer. That was a suit to recover certain tariff plates or their value, in an action founded upon the alleged option agreement. In that case there was a penalty imposed on both sides, and the Court held under such circumstances it is absolutely void and unenforcible, irrespective of the comparative guilt of the parties, but they recognize the rule that if the parties are *not in pari delicto*, the party who was at fault can recover money paid under an executory contract, citing *McAllister v. Drepaeu*, 14 Cal. (2d) 102 (112), 92 Pac. (2d) 911, 125 A. L. R. 800. That case was a case involving an HOLC loan and the mortgagor was allowed to cancel the second mortgage and recover his money back, on the theory that he was only slightly at fault. They then go on to say "such relief is even granted to a party *equally at fault*, if he repudiates the contract before the illegal part of the bargain is executed." Citing the *Wasserman v. Sloss case*, 117 Cal. 425, above cited, and go on to say that the granting of relief, however, to one who repudiates an illegal contract is entirely different from granting to one who seeks to enforce it, and the Court will not enforce an illegal contract, merely because one party's fault was slighter than the other.

In *Colby v. Title Insurance Co.*, 160 Cal. 632, 117 Pac. 913 (916), 35 L. R. A. (N. S.) 813, the Court said:

"It is true as a general rule, equity will not aid one party or another to an illegal transaction, where they stand *in pari delicto*, but will leave them just where it finds them to settle these questions without the aid of the Court, but this rule only applies where the parties are *in pari delicto*, where the illegal transaction is entered into voluntarily, and the turpitude of the parties is mutual. Where, however, the party

seeking relief is not a free moral agent, and his consent to the illegal transaction is obtained through *duress*, he is not regarded as in *pari delicto*, and will not be precluded from invoking affirmative relief in equity."

In *Davis v. Green*, 91 N. J. Eq. 17 (19), 108 At. 772, it was held that the maxim—that he who comes into equity must come in with clean hands—is subject to well defined limitations. While the general rule is that where parties are in *pari delicto* no affirmative relief would be given to one against the other. That rule has always been regarded by courts of *equity*, as without controlling force in all cases in which public policy is considered advanced by allowing either party to sue for relief *against the transaction*.

In *Erwin v. Curie*, 171 N. Y. 409, 64 N. E. 162, 58 L. R. A. 830, the Court said:

"After a very careful review of the authorities pointed out, where the contract is *malum in se*, thus involving moral turpitude, or violating some principle of public policy, the courts will in no case either free or relieve either party from any of its consequences. But when the contract is merely *malum prohibitum*, the court will interfere if the guilt rests chiefly upon one, although *both have participated in the illegal act*."

In *Pullman's Car Co. v. Transportation Co.*, 171 U. S. 138 (150), the Supreme Court of the United States again laid down the rule that a person cannot sue on an illegal contract, but can disaffirm, and is so permitted only because of the Court to do justice as far as possible to the one who has made payments or delivered property under a void agreement, which in justice he ought to recover

the value of the property, with interest, as the property cannot be returned. The suit is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract by the defendant to return, or failing so to return, value of the property so delivered was allowed *with interest, not from the date of judgment but from the date of the delivery of the property*, January 1, 1885. That case referred to and approved *Spring v. Knowlton*, 103 U. S. 49.

The doctrine that the Courts will not aid a plaintiff who is in *pari delicto* with the defendant is not a rule of universal application. It is based on the principle that to give plaintiff relief in such a case would contravene public morals and impair the good of society. Therefore, the rule should not be applied in a case in which to withhold the relief would to a greater extent offend public morals.

There may be such an inequality of conditions between persons in *pari delicto* that relief may be given to the more innocent, if there are collateral and incidental circumstances attending the transaction and affecting the relations of the parties which render one of them comparatively free from fault, or where the Courts intervene from motives of public policy.

Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934, 113 A. S. R. 709, and extended note beginning at page 724.

Under this array of authorities there can be no question that appellee had the right to rescind and recover its money back, and the lower Court was right in so deciding.

Cases Cited by Appellants Distinguishable

Beginning on page 14 of appellants' brief and continuing clear through to page 57 of said brief, it is our contention that not a single case cited in all that brief denies our right to rescind and recover back the money paid.

Every case cited either involves the attempt to recover the money or property delivered under an illegal contract, after the contract is fully executed, or they are cases where a party to an illegal contract seeks to enforce the illegal contract or enjoin the other party from doing anything in violation of its terms.

We contend that the correct rule of law to be applied under those circumstances is to deny relief to either party under the doctrine of "clean hands."

Ford v. Casper, the first case cited, 42 Fed. Supp. 994, affirmed 128 Fed. 885, was an attempt to set aside a conveyance which was given to defeat creditors; thereafter the results sought for *were accomplished*. The plaintiff brought the action in equity to have the defendant declared a trustee for his benefit, and, of course, he could not do that.

In *Carolene Products Co. v. Evaporated Milk Assoc.*, 93 Fed. (2d) 202, next cited, the plaintiff sought an injunction against the defendant to restrain it from conspiring to injure or destroy the interstate trade of plaintiff contrary to the Sherman Anti-Trust Act, and he himself was engaged in violation of the Federal Filled Milk Act. All he sought to do there was to declare the Act unconstitutional. The Court held it was constitutional

and, of course, they did not aid him in enforcing the contract.

In *Mas v. Coca-Cola Bottling Co.*, 163 Fed. (2d) 505, plaintiff brought a suit against the company to be adjudged entitled to a design patent on a beverage bottle, claiming he had a patent on it. It developed he had forged documents and used perjured testimony with reference to obtaining the patent. Of course, he should be denied relief.

Keystone Drilling Co. v. General Excavating Co., 290 U. S. 240, was a suit to enforce an illegal contract, and not to disaffirm.

Preameau v. Cranfield, 193 Fed. 912, was a suit brought for an accounting under an illegal contract and a return of the money which he had sent for investment. Evidence shows they were engaged in a fraudulent sale of mining stock. The Court said it is no part of the Court's function to aid a party to a fraud or illegal scheme *in carrying it out, in adjusting the accounts or dividing its spoils*.

In *Smith, et al., v. Cal. Thorn Cordage Co.*, 129 Cal. App. 93, the plaintiff entered into a contract in violation of the laws of the State of California, to pool his stock so that the vote of the directors could be controlled. Thorn voted the stock, although he conveyed it illegally, and he claimed that the illegality allowed him to vote the stock. The other members brought suit to set aside the action of the stockholders at this meeting where Thorn voted the stock, and he filed a cross-bill asking the return of the stock. Of course, his relief was denied because the matter had been *fully executed*.

We have called the Court's attention to three California cases above which, when they pass on the question as involved here, that is the right to rescind, they uphold the right where the contract is *executory*.

The citation from Ruling Case Law, page 22, admits its exceptions to the general rule of clean hands, where there is a repudiation of the contract before *the execution of the unlawful purpose*.

The California case in the 109th, set out on page 22 of appellants' brief, does not involve the question here.

The quotation from 19 Am. Jur. (Equity), Sec. 471, page 325, simply states:

“A court of equity will not adjust differences between wrongdoers, assist in the enforcement of an illegal or immoral contract, or lend its aid to the division of profits derived from such illegal contract or afford relief against the evil consequences thereof.”

Ferryington v. Stucky, 165 Fed. Rep. 325 (8th Cir.). Plaintiff brought suit to enjoin the foreclosure of a trust deed on the ground that the consideration was against public policy and illegal. That suit, however, was seeking affirmative relief under the contract, and of course his right under that was denied.

We are not asking *affirmative relief* on our contract as discussed in that case, on the theory that we are less culpable.

That case admits that that rule is confined to violations of statutes, or to offenses in which the law violated is intended for the coercion of one party and the protection of the other.

The 22 Pick. 181 case involved also the *enforcement* of an illegal contract.

Camp v. Aetna Ins. Co., 68 A. L. R. 1169, cited, was an action brought to cancel an insurance policy in accordance with its terms, and if so cancelled the unearned portion of premium should be returned on surrender of the policy. The petition alleged that the company was cancelling it for an illegal or immoral purpose. The Court held that there was nothing in the proceeding contrary to law, and they sustained the general demurrer to plaintiff's petition, which sought to enjoin the cancellation of the fire insurance policy.

At top of page 30, appellants' brief, they cite *Jackson v. Baker*, 48 Ore. 155, 85 Pac. 512, as being a case in point, where the plaintiff paid the defendant the sum of \$1,000.00 under an agreement whereby the defendant was to convey his homestead to plaintiff as soon as he obtained it from the Government, but the homestead was subsequently cancelled on the ground that it was not open to a homestead at that time. The plaintiff sought to recover the \$1,000.00. The Court rightfully held that they did not give his money back because the illegal deal was *already consummated*. Plaintiff's counsel sought to distinguish that case on the ground that they were not in *pari delicto*, but the Court held they were; therefore, they would not return the money after the contract was fully executed.

In our brief we call your attention to the fact that the Oregon Court when a cancellation of the illegal contract is sought *before it was executed* held, in *Barnard v. Taylor*, 23 Ore. 416, 31 Pac. 968, 37 A. S. R. 693, 18

L. R. A. 859, that even where the parties are in *pari delicto*, following the leading case we rely upon, *Spring v. Knowlton*, 103 U. S. 49, they would allow rescission and recovery of the money back.

Appellants cite 12 Am. Jur., Contracts, Sec. 213, page 725, where it is stated:

“The Courts will not enforce rights arising out of an executory illegal agreement, but even where it has been executed in whole or part by the payment of money, the Court will refuse to grant relief, unless, as will be seen, the former repudiates the agreement before the execution of the *unlawful purposes*.”

That is right in harmony with our contention and also the following:

“Neither party to an agreement that has been *executed on both sides* will be aided in recovering back what he has parted with under the agreement.”

Appellants rely (page 33 of brief) with a great deal of confidence on *Harriman v. No. Sur. Co.*, 197 U. S. 244, but an examination of that case will show that Harriman had assisted in organizing the Northern Surety Company, the purpose of which was to hold stock of several railroad companies, and he transferred to the Northern Surety Company large holdings of the Northern Pacific, taking in payment stock of the Surety Company. Thereafter Harriman brought the action to recover the stock, claiming the whole transaction was *illegal, ultra vires* and *void*. An examination of that case, however, will show that it was several years after this was done and after the illegal contract was *fully executed* that Harriman sought to get his stock back, and the Court said that the property delivered was under an *executed contract*, and therefore

could not be recovered back by any party in *pari delicto*, and that the Court could not relax the rule where the record disclosed no special considerations of equity, justice or public policy either to enforce it or set it aside. They admitted, however, in that opinion that if it had remained *executory*, or if the parties were considered *not in equal fault*, they would grant relief, citing *Thomas v. Richmond*, 12 Wall. 349 (355), and *Spring v. Knowlton*, 103 U. S. 49. Admitting that if it was still *executory* the parties could have rescinded, but they pointed out that no one made an attempt to rescind. Therefore, the Court did not aid Harriman after the contract was fully executed.

The same exception is pointed out in 145 U. S. 393, cited by appellants at pages 34 and 35, to the effect that if the contract is illegal affirmative relief against it will not be granted in law or in equity, *unless the contract remains executory or unless the parties are considered not in equal fault*. The very contention we are making here, and they go on to say:

“When the parties are in *pari delicto* and a contract has been *fully executed* by plaintiff, and has not been repudiated by defendant, they will not aid the plaintiff to recover back property conveyed or the money paid.”

As we pointed out in our brief, in *McCutcheon v. Mertz*, 71 Fed., that 145 U. S. case was referred to and the same distinction made, and *equity* cancelled the contract in that Mertz case, so that there is no lack of harmony in these cases at all.

Marshall v. Lovell, 11 Fed. (2d) 632 (page 35, brief), appellant claims is almost in toto in support of his posi-

tion, but there the record shows that after the illegal deal was *fully consummated* Marshall brought action to recover the money which he had paid. There the plaintiff sought to recover the *profits* of the deal on the theory that the case was only *malum prohibitum*, upon the grounds of public policy, the theory being that Lovell was in possession of a gain unlawfully acquired under a contract void *ab initio*. His right to recover the gain was denied.

They cite with approval the Harriman case, both of which cases are seeking to recover, one the gain and the other the property delivered after the contract was *fully executed*.

Referring to the affirmance of the Lovell case, 19 Fed. (2d) 751 (8th Cir.), it is claimed that the Circuit Court went further than the District Court's opinion. But at page 39 that Court seems to recognize the rule, where both have not either the same willingness and wrongful intent engaged in the same transaction, and are *not*, therefore, *equally blameworthy*, a Court of equity may in furtherance of justice and of a sound public policy aid the one who is comparatively more innocent, and may grant him affirmative relief, by cancelling an *executory contract*, by setting aside an *executed contract*, conveyance or transfer, by recovery back of money paid or property delivered. Such an equality of conditions exists so that relief may be given to the more innocent party, and one of them is influenced by *duress*.

Appellants referred to 14 Cal. 210 (212), page 41 of their brief, but that was a case where the parties sought relief under a *fully executed contract*, and we have shown

in our brief when a contract is executed, although illegal, California follows the *Spring v. Knowlton* case, 103 U. S. 49, and allows a cancellation and rescission of the contract and recovery of the money back.

Then appellant, on page 41, relies upon the recent case of *Precision Inst. Mfg. Co. v. Automotive Maintenance*, which he cites as 325 U. S. 893, 65 S. C. R. 993, which should be 324 U. S. 806, but that case is clearly distinguishable. It was brought to restrain the infringement of a patent, and the defense was that the plaintiff in procuring the patent had wrongfully claimed patent rights which it knew were fraudulently procured, and he was the beneficiary of the wrongful act. Of course, the Court did not aid him in *carrying out* his illegal contract or *protecting him under it*.

Appellants state at page 43 of their brief that there is no question but what this action is based upon an unlawful contract. We submit that is not true. It is based on the repudiation of an illegal contract before the illegal part is carried out, and to rescind the contract, cancel it and recover the money back, which under all the authorities we have the right to do.

None of the other cases cited by the appellants are in point, but several of them seem to recognize the right that where one repudiates the contract before the execution of the unlawful purposes he can recover his money back, but no one can recover under a contract that has been executed on both sides, as equity will not aid them to recover what they have parted with under the contract.

Several cases are cited from Words and Phrases on the definition of Moral Turpitude, and appellants, at page

52 of their brief, seek to distinguish the *Spring v. Knowlton* case, to the effect that even though the illegality is based on the statute, that is *malum prohibitum*, if there is moral turpitude over that, that will defeat recovery. That case stated and held that there was no moral turpitude in such a contract, *clearly meaning one which is just malum prohibitum*.

Appellee's Answer to Claim That Judgment Is Not Supported by the Findings of Fact

At page 58 of appellants' brief, they claim under Rule 52, Federal Procedure, the Court is required to make Findings of Fact and Conclusions of Law, and direct the entry of judgment appropriate to the Findings of Fact.

That same rule provides that "the Circuit Court will not reverse the findings of fact unless the lower court's findings of fact are clearly erroneous. The following cases so hold.

Augustine v. Bowles (Cal.), 9 Cir., 149 Fed. 93.

Crowell v. Baker Oil Tools Co. (Cal.), 9 Cir., 153 Fed. (2d) 972.

Findings of Fact are not necessary on uncontested issues.

Fontes v. Porter (9 Cir.), 156 Fed. (2d) 950.

Rule 19 of this Circuit requires the record to be printed and confines the appeal to that part of the record that is printed.

At the outset we challenge the right of appellants to review this question, for the reason that they have not

printed the full record containing evidence upon which the Court based his findings of fact.

In the lower Court the appellants designated the complete record, but only designated part of the record in the appellate Court, and only printed part of the record. They left out all exhibits except 1, 2 and 3, and all depositions of Cooper and others referred to as Ex. 27, and Kincaide deposition taken below.

In *Sampsell v. Auches*, 108 Fed. (2d) (9 Cir.) 945, this Court commented on a record similar to this one, and the record on appeal quoted portions of the reporter's transcript, the dockets and exhibits covered by the stipulations between the parties, but none of the exhibits have been printed as parts of the record on appeal.

Your Honors held that under Rules 19 and 20, with relation to the printing of the record and briefs, only those parts of the record on appeal which are printed are to be considered by this Court. Under that Rule 19, Subdivision 9, provides that the Clerk shall print those parts only, and the Court will consider nothing but those parts of the record.

In that case, as in this, the appellees did not request any more record but we did write to Mr. Seitz, who represents appellants, and called his attention to the fact that he had not printed all the record, and he wrote back saying that he did not have to, as he designated only certain points to be raised, and in his opinion the record printed was sufficient to raise those questions. Therefore, we have already called his attention to our claim that in our opinion he cannot raise the question he now seeks to raise, that is, that the findings of fact are con-

trary to the evidence *because he has not printed all the record.*

In the opinion referred to above in the 108 Fed. (2d) 945, Your Honors state, that the appellees are not compelled to add to the record. He may do as he desires. Nothing in this record indicated he so desired. Indeed, Your Honors said, *it is quite immaterial to appellees, because if the record did not contain all the evidence there would be little chance of Your Honors correcting the findings, in case they were not supported by substantial evidence.* As here it is clearly shown that the printed record does not contain all the evidence, and the Clerk so certified to it. See his certificate, page 45, Transcript of Record.

Under these circumstances the above case is authority that you will not reverse the findings of the Court, because the complete record is not printed.

This is also the rule and also so held in *Metz v. National City Bank of Evansville*, 115 Fed. (2d) 65; Cer. denied, 311 U. S. 675, 61 S. C. R. 41.

Asst. Ind. Corp. v. Manning (9th Cir.), 107 Fed. (2d) 362.

Zander v. Lutheran Brotherhood of Minn., 157 Fed. (2d) 17 (8th Cir.).

Sublette v. Servel, 124 Fed. (2d) 516, where the Court said:

“Where the record submitted to the Circuit Court of Appeals included only so much of the evidence as was designated by appellants for inclusion in the

record, the Circuit Court of Appeals could not review the question as to whether the District Court's findings were clearly erroneous under the Federal Rules. District Court findings are presumed to be correct, and in absence of a proper record shown to contain all the evidence essential to determine correctness of challenged findings, such findings cannot be questioned on review."

Citing with approval *Oriole Phonograph Co. v. K. C. Fabric Products Co.*, 34 Fed. (2d) 400, 401, and *Pratt v. Stout* (8th Cir.), 85 Fed. (2d) 172 (176). To the same effect see *Howard v. C., B. & Q. R. R. Co.*, 146 Fed. (2d) 316 (8th Cir.).

Under these authorities you can sustain the Court's findings of fact on the evidence in the record, as we contend that, as shown by the printed record, there is ample evidence to show that these option contracts were a sham and not to be enforced, and were mere evasions of the O. P. A. law and regulations thereunder, *but you cannot reverse that finding because the complete record is not printed.*

Were These Options Sham Contracts and Evasions of O. P. A.?

At the bottom of page 58 of appellants' brief they claim that the Court did not find that the options were a sham. He did not say that in so many words, but his finding that this transaction was an evasion of the O. P. A. must have been, of necessity, equivalent to a finding that they were a sham, because if they were valid options to purchase stock there would be no evasion of the O. P. A. and no occasion to cancel and rescind, as appellee requested and the Court granted.

Parol Evidence Is Admissible to Show Illegality of Contract

It is well settled that parol evidence is admissible to show that a contract in suit is illegal. The general rule which forbids the introduction of parol evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that the contract was made in the furtherance of objects forbidden by statute, by common law, or by the general policy of the law.

Muskogee Land Co. v. Mullins, 165 Fed. 179, 16 Am. & Eng. Ann. Cases 387, and extended note beginning page 388.

In *Wilhite v. Roberts*, 4 Dana (Ky.) 172, the Court stated the reason for the above rule as follows:

“No instrument is so sacred, when tinctured with illegality or fraud, as to raise it above the scrutiny of parol testimony. And indeed it would be highly impolitic that it should; for if this rule should prevail as applicable to illegal and vicious contracts, it would be an easy matter to place all contracts, however illegal or vicious, above the reach of the law. It would only be necessary for the parties, as is alleged in the case before the court, to have a secret, illegal understanding, and to introduce into a written contract, fair upon its face, stipulations that are legal, but highly penal, as a means to enforce a compliance with the terms of the secret illegal bargain. The arm of the law is not so short as to permit such evasions.”

In *Paxton v. Popham*, 9 East. (Eng.) 416, the Court said:

“Unless the obligor were permitted to contravene the condition of the bond by plea showing the truth of the transaction, a bond would be made a cover for every species of wickedness and illegality.”

In *Russell v. DeGrand*, 15 Mass. 35, the reason was stated as follows:

“If such evidence is not admissible, parties can always control the laws, by the terms of their contracts; and in order to defeat an illegal contract, it would be necessary that the parties should be weak enough to expose the illegality in the instrument they adopt for their security.”

Parol Evidence Admissible to Show Real Purpose

Parol evidence is admissible to show the real purpose for which a contract was made, and that it was a mere sham and not to be carried out as a contract.

Burke v. Delaney, 153 U. S. 228, 14 S. C. R. 816.

Ware v. Allen, 128 U. S. 590, 9 S. C. R. 174.

Coffman v. Malone, 98 Neb. 819, 154 N. W. 726, L. R. A. 1917B 528, with note 263, on competency of parol evidence that contract valid on its face was not intended to create legal relations, but was executed as a sham.

Vincent v. Russell, 101 Ore. 672, 201 Pac. 433, 20 A. L. R. 431.

N. Y. Trust Co. v. Island Oil & Trans. Corp., 34 Fed. (2d) 655 (2d Cir.).

Felming v. Morrison, 187 Mass. 120, 72 N. E. 499.

In re Hicks & Sons, Inc., 82 Fed. (2d) 272 (2d Cir.); approved in *Pepper v. Litton*, 308 U. S. 295, 60 S. C. R. 238 (247).

Zell v. American Seeding Co., 138 Fed. (2d) 641.

Hallett v. Moore, 282 Mass. 380, 185 N. E. 474, 91 A. L. R. 572.

Porter, Admr., v. Gray, 158 Fed. (2d) 142 (9th Cir.), on oral evidence to show device to evade O. P. A. regulations.

Land Co. v. Mullens, 167 Fed. (8th Cir.) 179, 16 Ann. Cas. 387, and extended note.

Enterprise Frame & Novelty Co. v. Sherman, 185 Misc. 5, 49 N. Y. S. (2d) 860.

In *New York Trust Co. v. Island Oil & Trans. Co.*, 34 Fed. (2d) 655, a contract was entered into, the real purpose of which was to evade the Mexican law. In this case the Court held, it was always possible to show that the parties did not intend to perform what they said they would, for instance that the transaction was a joke, that it arose between relatives of a family which forbade it. That they were a sham which nobody did, and nobody advised could, understand to be more. Perhaps for this reason they were a fraud on the Mexican Government. But that as the evidence showed, notwithstanding that fraud was shown they were not to be enforced because the parties did not intend them to be, and if the Court was asked to intervene between them and give relief based upon the sham contract, the Court would refuse, but the Court could not raise an objection where none did otherwise exist, because both were concerned in a fraud upon a third. As compensation this would be fruitless; as law it creates an obligation *ex turpi causa*.

In *Burke v. Delaney*, 153 U. S. 228, 14 S. C. R. 816, it was held that where a paper purporting to be a promissory note is sued upon by the payee himself, the maker may show a parol agreement that the note was to be a binding obligation only upon a certain contingency which never happened.

Following *Ware v. Allen*, 128 U. S. 591 (595).

This *Delaney* case was followed in Nebraska in *Coffman v. Malone*, 98 Neb. 819, 154 N. W. 726, L. R. A.

1917B 263, where the Nebraska Court held that parol evidence is admissible to show that the parties to the suit had mutually agreed that a written contract, which plaintiff is seeking to enforce, was never to be performed, but was a mere sham executed for the purpose of influencing the conduct of a third person.

In *In re Hicks & Sons, Inc.*, 82 Fed. (2d) 277 (279), it was held that it is well settled that whatever the formal documentary evidence, the parties to a legal transaction may always show that they understood a purported contract not to bind them. It may for example be a joke or a *disguise to deceive others*. Citing 34 Fed. (2d) 655, above, and the Coffman-Malone case and others.

In *Porter, Admr. O. P. A., v. Gray*, 158 Fed. (2d) 442, this Circuit held that evidence was sufficient to establish that defendant had violated the O. P. A. Regulations by designating the payment received in excess of the mill selling price as commission for the service of procuring shingles, and to give out this scheme defendant established a so-called procurement under which the customer forwarded to defendant in advance of any shipment a remittance equal to the selling price of a carload of shingles, plus a fee of \$100.00 per car. The defendant there did, as Kincaide did here, purchase the shingles on his own credit and countersigned any specific credit to whatever customer he wished, and paid for the car by drawing a check against the so-called agent's account, but he controlled the shipments, under his own petition. The defendant gave color to the transaction as though it was a bona fide employment, and he requested that the customer list him on his payroll as an employee and pay the social security accordingly, and the customers did so.

The Court held that this method was a *device to evade the maximum price regulations* of the O. P. A., and allowed the O. P. A. administrator to recover damages for the wrongful evasion.

Evidence of Similar Plans Admissible

Evidence of similar transactions showing a general plan or system of dealing is permissible to show the purpose or plan in the individual case.

N. Y. Life Mutual Ins. Co. v. Armstrong, 117 U. S. 591, 6 S. C. R. 877.

Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119, 107 A. S. R. 823, 20 Am. Jur., Sec. 303, page 281.

This above rule applies in civil cases as well as criminal cases.

Weiss v. U. S., 122 Fed. 665 (682).

It is our contention, therefore, that under these authorities and much more that could be furnished, we were entitled to show that these contracts, although purporting to be bona fide options to purchase stock in these corporations, were a mere sham and intended as an evasion of O. P. A. Regulations. That in order to establish that fact we could show that there was a general plan or scheme entered into by the defendants through their agent, Mr. Kincaide, to adopt this method of evading O. P. A. Regulations, and that they were never intended to be carried out as options. In fact, it would be absurd to think that they were. That Storms would invest \$60,000.00 of his own in this and then give options covering every share of stock that there was in the corporation, including his own

and other stockholders, then intended to turn over to these people who had options.

The evidence shows that none of these options were ever exercised; that this was a plan also devised in a previous deal, which was known as the Eclipse Deal, in which the stock was divided up into these so-called options and lumber was furnished under that deal at over O. P. A. price, and even before the time given under the options had expired the company sold the business. This would hardly be consistent with the theory that they were bona fide options, and in fact the evidence shows that after Judge McColloch had warned the defendant, Kincaide, to tell the truth he went on the stand and admitted that all these options, which were all similar in form, were *never intended to be exercised and were designed as O. P. A. evasions*. To the same effect see *Zell v. Am. Seeding Co.*, 158 Fed. 641 (2d Cir.).

Discussion as to Whose Agent Kincaide Was

At page 59 of appellants' brief the argument is made that all the testimony introduced in evidence concerning the contract, relating entirely to conversations and agreements made between the defendant, Kincaide, and appellee and that there is no evidence to indicate that Mr. Storms or any representative of the Danebo Lumber Company participated in any way in these conversations. Therefore, there is no evidence to show or justify the claim that Kincaide was the agent of the appellants.

They further claim that they were not bound by the acts of Kincaide if he was not their agent or exceeded his authority, on the theory that the contract cannot be ratified by the principal unless the principal has full knowledge of what the agent did.

See discussion, page 64 of appellants' brief and following.

Again appellants are met by the proposition that they did not print all the record and, therefore, they cannot raise the question that the evidence does not show that Kincaide represented Storms and the company to be formed, as their agent. If they had printed Kincaide's deposition taken at the time of the pre-trial it would have disclosed that he testified that he was representing Mark C. Storms as well as himself, and that he had been sent down to see what kind of a deal he could make with reference to raising money for Storms to organize his new company.

If appellants had printed the depositions of Cooper and others, it would have disclosed that all of these deposition witnesses testified, as Vana testified, that Kincaide came to them, *not* as their agent, but with a proposition from the principal, that he represented that he could get them lumber if they would put up the money to help finance it, and while Storms pretended to testify that he had no knowledge of what Kincaide had represented, and that he did not intend to evade O. P. A. Regulations, he was very particular to limit that denial to the *Danebo Lumber Company*. He was asked if he hadn't made similar deals with Mr. Hoppe, one of the retail dealers, and he didn't deny that he had made a deal with Hoppe previously to pay over the O. P. A. price, but he said the *Danebo Lumber Company* had never done such a thing. However, had they printed Hoppe's testimony this record would have disclosed that Hoppe testified that he had made similar deals to this one with Mark C. Storms when he operated the Monroe Lumber Company, a company

Storms also contrlled, but as that is not in the printed record it is again our contention that this Court will not review the Findings of Fact of the Court because the testimony is not all printed in the record.

Again the appellants cite numerous cases claiming that the representatives of an agent, who is not authorized to make the representations, do not bind the principal unless the principal ratifies them with full knowledge of the fact.

It is our contention that we are not interested in that matter, because those cases involve cases where you are seeking to hold the undisclosed principal *on the contract*, on the theory that as the principal has received the benefits of the deal he cannot escape the burdens.

It is our contention that does not avail the appellants anything, because first he has not printed all the record to show whose agent Kincaide was.

Second, Kincaide is either their agent or he is not; if he was their agent duly authorized to make the deal as he made it with Vana, then his principal would be bound. But if the principal claims that the contract that his agent made was beyond his authority, then the principal cannot claim and keep the benefits, which in this case was the cash he received under Kincaide's deal.

That this is true is established by the leading case of *National Bank & Loan Company v. Petrie*, 189 U. S. 423, 22 S. C. R. 512, which was a case where the bank had sold certain bonds and Petrie, the vendee, obtained judgment for the purchase money in the State Court, on the ground that the sale was obtained by *false representations of the*

president of the bank. The question of the want of authority of the president to make such representation was raised by the bank. The Supreme Court in that case held that the bank cannot assert the *want of authority of their agent*, the president, to make the deal and at the same time *retain the benefits*; that the bank must adopt the whole transaction or none of it.

The Court in that opinion said:

“If the contract was illegal, and it was sought to be enforced the Court would leave the parties where they found them.”

Citing *Pullman Palace Car Co. v. Central Trans. Co.*, 171 U. S. 138 (150), 18 S. C. R. 808. But it went on to say:

“But a *person does not become an outlaw* and lose his rights by doing an illegal act. The right not to be led by fraud to change one’s situation is anterior to and independent of the contract. The fraud is a tort.” (Here in the case at bar the fraud, assuming Mark C. Storms’ testimony to be true, would be Kincaide’s misrepresentation to Vana and others that he was acting as agent for Storms.)

It is usual consequence that as between the parties the one who is defrauded has a right, if possible, to be restored to his former position. That right is not to be taken away because the consequence of its exercise would be the *undoing of a forbidden deed*. That is a consequence to which the law can have no objection, and the fraudulent party who authorizes might have been allowed to disclaim any different obligation from that which the other had been content, has lost his right to object, because he has brought about the other’s consent by wrong. (Again quoting the Pullman-Palace Car case.)

They then go on to say:

“It is true that the fraud was perpetrated by an agent, and it is argued that he did not represent the bank for an illegal act, but unless this means that there was no sale as the answer and a part of the argument seem to suggest, in which case of course Petrie *must have his money back*. The answer is that if the bank relies upon the sale it must take it with the burden of the fraud; it must adopt the whole transaction or no part of it. It cannot affirm what is for its advantage and repudiate the rest.”

Then the Court finishes up the opinion by stating:

“But when a right is claimed to repudiate it, referring to the illegal contract, the party who denies the right is the one who *relies upon the contract*, and that party must take it as it was made.”

As we construe this opinion, it means (assuming that this Court can pass upon this question as to whether or not Kincaide was the agent or not, in view of the fact that all the record is not printed) that if Storms claimed that Kincaide had no authority from him or misrepresented his authority and Storms got our money by that unauthorized means, if he wants to repudiate Kincaide's contract he cannot hold the money because it was through Kincaide's deal that Storms got all the money from plaintiff. If, however, he wants to keep the money he cannot raise the question that Kincaide was not his agent and did not have authority to make the contract. As this Court suggested, if Kincaide had no authority to make the deal then Storms has no right to hold the money, on the theory, as the Court said, there was no sale.

The evidence, however, clearly shows that Kincaide and Storms got together some time in June, 1946, and

this plan was then devised, and that was before Kincaide came to interview this appellee, which was the following July, or came to any of the other retail lumber dealers that went in on the same deal. So that the evidence that is even *in the printed record* clearly establishes the fact that it was Kincaide and Storms who devised the plan and drew up the options. None of the retail lumber dealers ever saw the mill; it wasn't then in existence; they never made any offer as to the amount of the stock, the names of the stockholders, number of shares that they were to get, or the total price they were to pay.

All the evidence shows that that was set up between Storms and Kincaide in Mr. Seitz's office *after* Kincaide came back from getting the money from the appellees and other retail dealers.

This 183 U. S. was cited with approval in *Cook v. The Bank*, 144 Fed. (2d) 423, which involved options that were taken by the famous Van Sweringen Brothers to control the railroads of this country. Following this case, 189 U. S. 423, it was held that where one is defrauded by the wrongful act of another he has the right to be restored to his former position. *Jefferson Standard Life Ins. Co. v. Heddrick*, 27 S. E. (2d) 198 (202).

And in *Openheimer v. Bank*, 85 Fed. (2d) 582, again following the 189 U. S., it was held, where an agent of an undisclosed principal induces sale by fraud, the agent must account for the purchase price. If contract is rescinded and *so must the principal if he gets the money*.

Now, the evidence clearly shows, as the Court found here, that Storms got this money and that would make him responsible and he, therefore, would have no right to

turn it over to the Danebo Lumber Company after it was incorporated unless that was part of the agreement, and Kincaide represented Storms, and the Danebo Lumber Company, if the contract is rescinded on account of its illegality, is liable as well as Storms, because it has no right to keep our money on any theory of this case.

If Kincaide was not the agent of Storms and Danebo Lumber Company, and he was certainly not the agent of appellee, then there was no meeting of the minds on any contract and we should get our money back. The Court was therefore right in his decision on this point.

Respectfully submitted,

GEORGE C. REINMILLER,
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By S. L. WINTERS,
Attorneys for Appellee.

No. 12163

IN THE
United States Court of Appeals
For the Ninth Circuit

o———o———o

KOUTSKY-BRENNAN-VANA COMPANY,
a Corporation,
Appellant,

vs.

DANEBO LUMBER COMPANY, INC., a Corporation,
and MARK C. STORMS, Individually,
Appellees.

o———o———o

Upon Appeal from the United States District Court
for the District of Oregon

o———o———o

BRIEF ON CROSS-APPEAL

o———o———o

ISSUE INVOLVED IN THIS CROSS-APPEAL

On page 43, Transcript of Record, the plaintiffs below served a notice of appeal, which notified the appellees that the plaintiff cross-appealed from that part of the formal judgment and decree entered on the 2nd day of December, 1948, in favor of plaintiff and against the defendant in the amount of \$15,000.00, which denied plaintiff interest on said sum from the date prayed for by the

plaintiff in its petition, to-wit, October 19, 1946, to the date of the entry of said judgment, claiming that interest should be allowed for that period at the rate of 6 per cent per annum, as part of the damages suffered by the plaintiff for the wrongful withholding of the amount of the judgment referred to.

The cross-appellant claims that it should be allowed interest as fixed by the law of the State of Oregon, where this case was tried, from the time that the evidence showed the appellees wrongfully withheld said money. Therefore, assign as error now,

That the Court erred in not allowing us this interest.

ISSUE INVOLVED

The date fixed in this notice of appeal, October 19, 1946, was the date that Kincaide told plaintiff that the shipments would begin, and perhaps that is too early a date in which to allow interest, and that a later date should be fixed, May 26, 1947, which was the date the uncontradicted evidence shows that the plaintiff demanded the return of its money at a meeting in the Paxton Hotel, Omaha, Nebraska.

As shown by the evidence referred to in the original brief, such a demand was made, and Kincaide got in touch with the defendants and notified the plaintiff and others that they would not return the money nor would they deliver lumber at the market price fixed by the Weyerhaeuser and Long-Bell Lumber Companies, and give credit on said purchases out of the \$15,000.00 that was advanced for the purpose of purchasing lumber.

The evidence also shows that on August 26, 1947, a notice (Ex. 8, p. 28, Tr. of Record) was given to the de-

fendant, demanding the money back and rescinding the illegal contract. That demand was refused, as shown by admissions in the pleadings and in the pre-trial order and in the evidence of the witnesses at the trial, all set out in the briefs in the appeal by the Danebo Lumber Company and Mark C. Storms.

EVIDENCE

The uncontradicted evidence set forth in the brief heretofore filed shows that the defendants got our money on July 20, 1946; that they were to deliver us the lumber beginning in ninety (90) days; and that they have never given us any lumber while the O. P. A. was in force, and the O. P. A. expired in November, 1946. That they have absolutely refused to give any lumber under the agreement under which the money was advanced and, therefore, they converted said money to their own use, certainly at least as early as May, 1947.

PROPOSITIONS OF LAW

It is our contention, therefore, that this amounted to a conversion of our property, and the amount is definite, and therefore we should have interest at the rate of .6 per cent, the amount fixed by the Oregon statutes, in the nature of damages for the wrongful withholding of our money.

The following cases sustain our right to that interest and hold that it is an abuse of discretion not to allow the interest.

Interest allowed under Oregon statute:

Public Market v. City of Portland, 171 Ore. 522, 130 Pac. (2d) 624, 138 Pac. (2d) 916.

Kem v. Fletcher, 174 Ore. 87, 147 Pac. (2d) 498.

Tracy v. Pioneer Trust Company, 175 Ore. 28, 149 Pac. (2d) 986, 151 Pac. (2d) 459 (9th Cir.).

Northern Pacific Railway Co. v. Twohy Bros., 95 Fed. (2d) 220 (227); Cert. Den., 304 U. S. 575.

The following cases hold that interest should be allowed where the amount is definitely ascertained at the rate fixed in the state where the Federal Court case is tried, from the date of the conversion or wrongful withholding:

National Car Loading Corp. v. Atchison, Topeka & Santa Fe R. R. (9th Cir.), 150 Fed. (2d) 210.

Miller v. Robertson, 266 U. S. 243, 45 S. C. R. 73.

Concordia Ins. Co. v. School District, 282 U. S. 545, 51 S. C. R. 275.

Klaxon Co. v. Stentor Electric Co., 313 U. S. 487, 61 S. C. R. 1020.

Jones v. U. S., 258 U. S. 40, 42 S. C. R. 218.

Rogers v. U. S., 158 Fed. R. (2d) 835 (2d Cir.).

Federal Surety Co. v. Bentley & Sons, 51 Fed. (2d) 24, 78 A. L. R. 1041, and note, page 1047.

Funkhauser v. Preston Co., 290 U. S. 163 (168), 54 S. C. R. 134 (136).

Royal Ind. Co. v. U. S., 313 U. S. 289 (295), 61 S. C. R. 995 (997).

Steingut v. Guarantee Ind. Co. of N. Y., 161 Fed. (2d) 571.

Cahan v. Empire Trust Co. (2d Cir.), 9 Fed. (2d) 713 (719).

Simecek v. U. S. Natl. Bk., 91 Fed. (2d) 214 (8th Cir.).

Intermita v. Perkins, 205 Fed. 603 (9th Cir.); Cer. Den., 231 U. S. 759.

Barnett v. Cobb, 140 Wash. 372, 250 Pac. 57.

Herman v. Golden Arrow Dairy Co., Inc., 191 Wash. 582, 71 Pac. (2d 581).

Pullman's Car Co. v. Transportation Co., 171 U. S. 151, 18 S. C. R. 808.

Brooklyn Savings Bank v. O'Neil, 324 U. S. 697 (714-716), 65 S. C. R. 895 (905-907).

ARGUMENT

It is the contention of this cross-appellant that where the amount sought to be recovered is definite and has been wrongfully withheld from a definite time, the Court should allow interest from the time that said money was wrongfully withheld or converted by the defendants, with interest at the rate fixed by the state statute in which the Federal case was tried, and that it is an abuse of discretion for the Court not to allow such interest.

In *T. & M. Trans. Co. v. Shattuck Chemical Co.*, 158 Fed. (2d) 909 (10th Cir.), it was held that where jurisdiction of a Federal Court is based on diverse citizenship, and the nature of the action is for money due on account and interest is not fixed in some binding manner, the law of the state is to be applied in respect to the allowance of interest, and the interest on the amount sought to recover should be allowed from the date when the over-charges, which was involved in that law suit, took place. In that case the lower Court only allowed interest for the amount of the over-charges *from the date of the judgment*, and the appellate Court held this was error and modified the judgment by the allowance of interest on over-charges

from the dates on which they occurred and, as modified, affirmed. At page 910 of the Federal Reporter they stated that the rule in diversity cases was that the law of the state was to be applied in respect to the allowance of interest, citing with approval *Jones v. Foster* (4th Cir.), 70 Fed. (2d) 200. They further stated that even where there is an action that is not a diversity action, interest on over-charges should be allowed on general principle even without regard to the local law, some with reference to the local law and others without. Citing *National Car Loading Corp. v. Atchison, Topeka & Santa Fe R. R.* (9th Cir.), 150 Fed. (2d) 210, cited above. And *Arkadelphia Milling Co. v. St. Louis So. Western Ry. Co.*, 249 U. S. 134, 39 S. C. R. 237. *Louisville & Nashville Ry. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 46 S. C. R. 73.

The Shattuck case concluded on general principle that interest should have been allowed on the several under-charges from the respective dates on which they occurred, the judgment was modified so as to allow interest.

In *Stiengut v. Guarantee Ind. of N. Y.*, 161 Fed. (2d) 571, interest was allowed as damages as a matter of law on conversion from the date of the conversion, and followed *Cahan v. Empire Trust Co.* (2d Cir.), 9 Fed. (2d) 713 (719).

Even before the Federal Rules, interest was allowed as damages for delay in payment, applying the state statute.

Royal Ind. Co. v. U. S., 313 U. S. 289 (295), where such interest was even allowed on unliquidated damages where the amount was easily ascertainable.

In *Funkhauser v. Preston Co.*, 290 U. S. 163, 54 S. C. R. 134.

In *Intermela v. Perkins* (9th Cir.), 205 Fed. 603, this Court held that in a suit against a city treasurer for a breach of his official duty that the liability of a treasurer arises by the reason of his refusal to discharge his official duty toward the plaintiff and sounds in damages, the measure of which is the amount of the warrant, with accumulated interest from the time his liability becomes fixed.

In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U. S. 487, 61 S. C. R. 1029, it was held that the state law of Delaware, where the case was tried, governed, rather than the state of New York with reference to the recovery of interest. There the Court held that the statute of state of forum controls and (now Rules) that interest should be allowed on the judgment from its date at the rate fixed in the state where the case was tried *did not exclude the allowance previous to the judgment*, and as the state statute allowed interest from the time of the wrongful withholding of the money, and where as in the Klaxon case, the right to recover interest as damages is in no way related to the validity of the contract, but *merely as an incidental item of damages*, interest with respect to which Courts at the forum, have commonly been free to apply their own or some other law, as they see fit. That the rule in Delaware should apply rather than the rule in New York, where the contract arose.

In *Fidelity Surety Co. v. Bentley & Sons* (6th Cir.), 51 Fed. Rep. (2d) 24, that case held that when necessary to arrive at fair compensation the Court, in exercise of sound discretion, may include interest or equivalent, as

element of damage where the interest is not specified in the contract, but awarded merely for damages for breach, rate of interest should be computed according to the law of the state where the Court which rendered the judgment is located.

That case is also found in the 78 A. L. R. 1041 and there is a note attached, beginning at page 1047, discussing the question as to whether the law of the forum or contract as governing the right to and the rate of interest as damages for delay in payment of money or discharge of other obligations, and the cases pro and con are given. But that annotation shows there is a diversity of opinion and was decided before the new rule, and before the Erie-Tompkins case, which now requires the Federal Court to follow the state law. It clearly shows that the provisions with reference to what rate shall control as to judgments was in dispute, and that the reason why the rule now provides that judgment shall draw the same rate of interest from its date, that the state law provides in the state where the case was tried, was to bring about uniformity of decision in the Federal Courts. This does not mean that you cannot allow interest before that date. All the cases cited from Oregon, above, show that the Oregon law allows interest for money wrongfully held in the nature of damages from the date of the wrongful withholding or conversion.

In *Northern Pacific Ry. Co. v. Twohy Bros.*, 95 Fed. (2d) 220, this very Court held that where money has been due and there has been a breach of contract, express or implied, to pay it, damages are recoverable for non-payment and the interest is upon the amount of damage from date of conversion. (Citing the Oregon statute.)

On page 26 of said Federal Reporter it is stated:

“It has sometimes been loosely stated that interest will not be allowed in Oregon upon damages for breach of contract. This statement is contrary to the statute providing for interest at the rate of 6% per annum on all moneys *after the same becomes due.*”

The lower Court refused to allow interest before judgment, and this Court modified the judgment to include interest at the rate of 6 per cent per annum from February 1, 1928. That was on unliquidated damages, and here the amount is definitely known from the very start, and the reason that some Courts did not allow interest on unliquidated damages does not apply and interest should have been allowed.

In *Miller v. Robertson*, 266 U. S. 243, 45 S. C. R. 73, it was held:

“One who has had the use of money owing to another justly may be required both in law and *in equity* to pay interest from the time payment should have been made.”

And they even held that although generally interest is not allowed on unliquidated damages but when necessary to arrive at fair compensation, the Court in the exercise of sound discretion may include interest, stating, page 78 of the Reporter, that “one who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity interest is allowed on money due.” Following *Spaulding v. Mason*, 161 U. S. 375 (396), 16 S. C. R. 592.

In *Jones v. U. S.*, 258 U. S. 40, 42 S. C. R. 218, it was held:

“In tort actions the usual rule is to leave the question of interest to the jury, but that since the discretion of the jury as to the allowance of interest in tort cases *does not mean a right to gratify a whim or personal fancy*, there would seem to be the same reason for allowing interest and depriving an owner of property of an ascertainable value as where there has been a misappropriation of money.”

In *Concordia Ins. Co. of Milwaukee v. School Dist.*, 282 U. S. 545, 51 S. C. R. 1930, interest was allowed on the amount recovered upon a fire policy even though the claim was unliquidated, the interest being included as equivalent to damages, were necessary to arrive at fair compensation. Following *Miller v. Robertson*, 266 U. S. 243, 45 S. C. R. 73.

In *Central Comm. Co. v. Jones Dusbury*, 251 Fed. 13 (7th Cir.), it was held that in assumpsit for damages for failure to take and pay for property purchased, it was permissible to include in the damages the loss of the resale of the property purchased, and the interest for the purpose for fixing the amount in controversy so as to give the Federal Court jurisdiction. Following the leading case in the Supreme Court of the United States, *Brown v. Webster*, 156 U. S. 328, 15 S. C. R. 377, where Chief Justice White held, where the suit was for the sale and eviction from certain premises by reason of the failure of title, that the point was made that under the law of the state in which the land was situated damages in case of eviction were limited to the return of the purchase price with interest thereon, which could not exceed \$2,000.00 and consequently fell short of the jurisdictional amount. Chief Justice White said:

“This contention overlooks the elementary distinction between interest as such and the use of an

interest calculation as an instrumentality in arriving at the *amount of damages* to be awarded on the principal demand. As we have said, the recovery sought was not the price and interest thereon, but the sum of the damages resulting from eviction. All such damage was, therefore, the principal demand in controversy, although interest, and price, and other things may have constituted some of the elements entering into the legal unit, the damage to which the party was entitled to recover.”

The Court further held:

“The entire damage claimed was the principal demand, and that the constitutional provision, excluding interest, to determine the amount in controversy was not applicable to interest, which was awarded as damage for the wrongful withholding of money.”

In *Pullman's Car Co. v. Central Transportation Co.*, 171 U. S. 151, 18 S. C. R. 808, interest on a rescinded illegal contract was allowed from date of wrongful withholding.

We, therefore, contend that under these authorities it was an abuse of discretion on the part of the Court to refuse to allow us interest from the date, at least May 26, 1947, when all parties agree that a demand was made for the return of the money and that demand was refused.

Therefore, the cause should be modified so as to include interest at the rate of 6 per cent from May 26, 1947.

Respectfully submitted,

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